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No. 02 1328 JAN 27 2003

In The
# Supreme Court of the United States

WARREN HILLS REGIONAL SCHOOL BOARD OF EDUCATION, PETER MERLUZZI in his personal and official capacity as Superintendent of the Warren Hills Regional Board of Education, BETH GODETT, in her personal and official capacity as Principal of the Warren Hills Regional High School, RONALD GRIFFITH and PHILIP CHALUPA, in their personal and official capacities as Vice Principals of Warren Hills Regional High School, and ELIZABETH AMES, MARCY MATLOSZ, RAY BUSCH, SUYLING HEURICH, JAMES T. MOMARY, NANCY FALLEN, WILLIAM MILLER, BRADLEY BRESLIN and SCOTT SCHANTZENBACH, each in his or her official capacity as a member of the Warren Hills Regional Board of Education,

*Petitioners,*

v.

THOMAS SYPNIEWSKI, JR., MATTHEW SYPNIEWSKI, and BRIAN SYPNIEWSKI, infants by their Next Friends, THOMAS and NANCY SYPNIEWSKI,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the Third Circuit's standard of "schools must point to a particular and concrete basis for concluding that the association between past and present conduct is strong enough to give rise to a well-founded fear of genuine disruption in the form of substantially interfering with school operations or with the rights of others" or this Court's standard of "reasonably . . . forecast substantial disruption of or material interference with school activities," is the law of the land?

2. Whether "ill-will" in the context of a school Racial Harassment Policy adopted in response to egregious racial incidents is unconstitutionally over-broad or vague?

## PARTIES TO THE PROCEEDING

Including the parties named in the caption of this Petition, the parties are:

Petitioner: Warren Hills Regional Board of Education is a school district in Warren County, New Jersey, a governmental corporation.

Respondents: Thomas Sypniewski, Jr.; Matthew Sypniewski and Brian Sypniewski are all individuals.

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## PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in the case.

## OPINIONS BELOW

The District Court's opinion (per Cooper, D.J.) denied Respondents' Preliminary Injunction. (Appendix ("Pet. App.") 67-134). The Court of Appeals' opinion (per Scirica C.J., joined by Ward D.J., and Rosen C.J. concurring and dissenting) (Pet. App. 1-66) reversing is published at 307 F.3d 243. The Court of Appeals' Order denying Rehearing and Rehearing En Banc (*Id.* 136-137).

## STATEMENT OF JURISDICTION

The judgment of the Third Circuit Court of Appeals was entered on October 3, 2002. The Court of Appeals entered an Order denying a timely Petition for Rehearing and Rehearing *En Banc* on October 29, 2002 (App at 135-136).

The jurisdiction of the Federal Court was invoked pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1343.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

1. U.S. CONST. amend. XIV

**Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**Section 2.** Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

**Section 3.** No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the

United States, or as a member of any State Legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

**Section 4.** The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

**Section 5.** The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

2. U.S. CONST. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

3. 28 U.S.C. § 1331

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

4. 28 U.S.C. § 1343

**(a)** The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

**(1)** To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

**(2)** To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

**(3)** To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

**(4)** To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

**(b)** For purposes of this section –

**(1)** the District of Columbia shall be considered to be a State; and

**(2)** any Act of Congress applicable exclusively to the District of Columbia shall be

considered to be a statute of the District of Columbia.

5. 28 U.S.C. § 1254

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

**(1)** By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

**(2)** By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

## STATEMENT OF THE CASE

Petitioner Warren Hills Regional Board of Education, (The Board), is a school district in Warren County, New Jersey. Respondents, Thomas, Matthew and Brian Sypniewski were at all relevant times to this case students at the Warren Hills Regional High School and Middle School.

After exhausting all other alternatives, the Board adopted a Racial Harassment policy in response to a pattern of disturbing racial incidents. Shortly after the enactment of the harassment policy, Thomas Sypniewski, was suspended from the high school for wearing a "Jeff Foxworthy" T-shirt inscribed with "redneck" jokes. Thomas Sypniewski, together with his brothers Matthew and Brian, filed this lawsuit mounting a "facial" and "as

applied" challenge to the Constitutionality of the Harassment Policy and Dress Code. The Sypniewski brothers named as defendants the Warren Hills Regional Board of Education and a list of school administrators.

Some examples of the pervasive racial disturbances that occurred before the adoption of the policy include but are not limited to:

> (1) A white student dressed for Halloween wearing overall jeans and straw hat, and appearing in a black face with a thick rope around his neck tied in a noose; (2) Increased incidents of students wearing and displaying the Confederate flag; (3) Some students formed a gang-like group known as the hicks,[1] and observed White Power Wednesdays by wearing Confederate flag clothing; (4) On Wednesday, September 20, 2000, a student walked down a main hallway of the high school waving a large Confederate flag; (5) Several instances of students telling racially offensive jokes and disseminating racially offensive material downloaded from the internet; (6) Confirmation of the existence of White Power Wednesdays by two students; (7) Many students were deeply offended by the actions of the hicks and their friends, including one student who felt like responding violently; (8) The racial tensions spilled over into the classroom, displacing class lessons with discussions about racial relations;

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[1] This was a factual dispute in the affidavits submitted below. The school administrators asserted that the group was known as the hicks and rednecks, but the Respondents stated that the group was only known as the hicks.

> (9) On December 1, 2000, a white student, enrolled at the high school, was harassed at home in response to this white student's association with several African American students, a large group of teenagers drove to his house where they physically threatened the student and called him a "nigger lover" among other expletives; (10) White Power Wednesdays continued including several more school students wearing clothing baring the Confederate flag, a student came to school with a large Confederate flag draped over the back of his truck. Numerous instances of racist graffiti were found on school walls some of which inspired hostile graffiti responses; (11) On one occasion, some students played a dehumanizing, racist song from their trucks in the parking lot aimed at African Americans; (12) A fight between a black student and a white student that resulted in one student's sustaining serious injuries including a concussion and stitches.

Thomas Sypniewski, one of the Plaintiffs in this case, acknowledged that on several occasions he wore a Confederate flag to school. On October 4, 2000, Thomas Sypniewski appeared in a local newspaper article about the Confederate flag. In the picture, Thomas Sypniewski was wearing a T-shirt displaying the text, "Not only am I prefect, I'm a redneck too!" The word "redneck" was printed in such a way that the confederate flag shows through the letters. Furthermore, the Third Circuit found that Thomas Sypniewski was at least friendly with the "Hicks". *Sypniewski v. Warren Hills Regional Board of Education,* No. 01-3061. The T-shirt that is the subject of this case was a Jeff Foxwothy T-shirt. The T-shirt was engraved with the following text:

"Top 10 reasons you might be a redneck sport's fan if . . .

10. You've ever been shirtless at a freezing football game.
9. Your carpet used to be part of a football field.
8. Your basketball hoop used to be a fishing net.
7. There's a roll of duct tape in your golf bag.
6. You know the Hooter's menu by heart.
5. Your mama is banned from the front row at wrestling matches.
4. Your bowling team has its own fight song.
3. You think the "Bud Bowl" is real.
2. You wear a baseball cap to bed.
1. You've ever told your bookie "I was just kidding."

The T-shirt is fairly representative of Foxworthy's country humor. Jeff Foxworthy has produced several books and compact disks with names such as, "You Might be a Redneck if," "Blue-Collar Comedy Tour," "Games Rednecks Play," and "Hick is a Chick."

On March 22, 2001 Thomas Sypniewski wore the Jeff Foxworthy T-shirt to school for the first time after the

implementation of the Harassment Policy.[2] During the last period of the day he was directed to the vice-principal's office by a security guard at the school for wearing the shirt. What occurred at the time between Thomas Sypniewski and the security guard is disputed. In his report the security guard stated that Thomas Sypniewski said "I've been waiting all day for someone to notice." Sypniewski denied that he made the statement.[3]

Thomas Sypniewski is also quoted in a local newspaper as discussing the T-shirt incident and stating as follows "The thought crossed my mind that this is going to piss people off." The Warren Hills Regional Board of Education believes that the gang-like group was not only known as the "Hicks", but was also known as the "Rednecks".

The policy that "the Board" adopted was identical to a policy which was upheld by the Tenth Circuit in a similar case *West v. Derby Unified School District No. 260*, 206 F.3d 1358 (10th Cir. 2000).[4] The Policy provides as follows:

> "District employees and students shall not racially harass or intimidate another student(s) by

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[2] Respondents contend in their affidavits that the T-shirt was worn to school several times without incident; even if this was true it was before the adoption of the policy. Furthermore, these statements were never subject to cross-examination by the defense.

[3] Another material factual dispute.

[4] The only difference is that the Policy in this case included the following additional language: "As part of the instructional process, professional staff may display and discuss divisive material and/or symbols when selected and used to enhance knowledge, provided these topics are included in the approved Warren Hills Regional School's curriculum. Said materials must be removed from display daily."

> name calling, using racial or derogatory slurs, wearing or possession of items depicting or implying racial hatred or prejudice. District employees and students shall not at school, on school property or at school activities wear or have in their possession any written material, either printed or in their own handwriting, that is racially divisive or creates ill will or hatred. (Examples: clothing, articles, material, publications or any item that denoted Ku Klux Klan, Arayan Nation-White Supremacy, Black Power, Confederate flags or articles, Neo-Nazi or any other "hate" group. This list is not intended to be all inclusive.)

In their Complaint, the Plaintiffs sought a preliminary injunction enjoining enforcement of the Racial Harassment Policy and a portion of the Board's dress code, as an unconstitutional restriction on the students' freedom of speech under the First and Fourteenth Amendments to the United States Constitution, and under the New Jersey Constitution, Article 1, Section 6. Plaintiffs also sought damages for disciplinary action taken against Thomas Sypniewski, alleging unlawful suspension under both the United States and the New Jersey Constitution, as well as claims for defamation and false light under New Jersey law which are not at issue in this Petition.

The District Court denied Plaintiffs' Motion for a Preliminary Injunction with respect to the racial harassment policy but found that "the challenged portion of dress code may not satisfy Constitutional standards and should therefore not be enforced prospectively during the pendency of this litigation against the wearing of clothing which violates the racial harassment policy." *Sypniewski v.*

*Warren Hills Regional Board of Education,* No. 01-3061, at 75.

Plaintiffs appealed the District Court's Order, specifically alleging that the Racial Harassment Policy is inconsistent with Plaintiffs' and other students' First Amendment rights.

The Third Circuit reversed the District Court in part, by a 2-1 vote, specifically by finding that that portion of the Racial Policy using the phrase "ill will" was unconstitutionally over-broad. The Third Circuit further reversed the District Court's denial of the Preliminary Injunction and granted a Preliminary Injunction, in favor of Respondents, prohibiting the Board from enforcing the Racial Harassment Policy against the Jeff Foxworthy T-shirt.

The Board, thereafter, timely Petitioned for a Rehearing En Banc, which was denied on October 29, 2002.

## REASONS FOR GRANTING THE WRIT

The Petition should be granted for the following reasons. First because the Third Circuit's decision conflicts with the holdings of this Court and of other Circuits. It runs counter to the ruling of this Court in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 809 S.Ct. 733, 21 L.Ed.2d 731 (1969). *Tinker* held that a school can regulate speech if it can

> **"reasonably . . . forecast substantial disruption of or material interference with school activities . . .".**

393 U.S. at 514. Contrary to *Tinker*, and decisions in several other Circuits, the Third Circuit has established a

new standard for school regulated speech. According to the Third Circuit, a school can only regulate speech if it can

> **"point to a particular and concrete basis for concluding that the association is strong enough to give rise to well-founded fear of genuine disruption in the form of substantially interfering with school operations or with the rights of others."**

*Sypniewski v. Warren Hills Regional Board of Education*, 307 F.3d 243, 257 (3rd Cir. 2002). Clearly, the Third Circuit's standard is a more stringent standard than that which this Court has previously created for the regulation of speech in the school environment; in fact, the standard is more stringent than any other Circuit in the country.

Second, this Petition should be granted, because the Third Circuit's holding conflicts with the specific holding of the Tenth Circuit in *West v. Derby Unified School District No. 260*, 206 F.3d 1358 (10th Cir. 2000), *cert. denied*, 121 S.Ct. 71 (2000), which held the same identical policy in question in this case was not unconstitutionally over-broad nor unconstitutionally vague and therefore did not violate the student's First Amendment right to free speech.

The decision in *West*, considered this Court's precedent in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 266, 180 S.Ct. 562, 98 L.Ed.2d 592 (1988) ("a school need not tolerate student's speech that is inconsistent with its basic educational mission even though the government could not censor similar speech outside the school."); *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 683, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986) ("the determination of what manner of speech in the classroom . . . is inappropriate properly rests with the school board."); but relied on *Tinker v. Des Moines Independent Community School*

*District*, at 393 U.S. at 506, which held "where school authorities reasonably believe that a student's uncontrolled exercise of expression might substantially interfere with the work of the school or impinge upon the rights of others," the school may forbid such expression. 393 U.S. at 506.

There is no way to reconcile the standard used by the Third Circuit in this case and the other First Amendment school cases and, therefore this Court should grant *Certiorari*.[5] Furthermore, since the policy at issue in this matter is identical to the policy and adopted by the Warren Hills Regional Board of Education from the *West* case there is no logical way to reconcile the split of authority between the Third Circuit and the Tenth Circuit. This issue is very significant, considering the current situation in our Nation's schools, and the need for administrations to be proactive to ensure a safe atmosphere for all the children.

## I. THE DECISION BELOW SETS AN IMPROPER STANDARD MERITING THIS COURT'S IMMEDIATE INTERVENTION BECAUSE IT WILL CAUSE IRREPARABLE HARM TO SCHOOL AUTHORITIES IN THE THIRD CIRCUIT.

In *Tinker*, *supra*, this Court adopted a standard for the regulation of speech in a school environment.[6] The

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[5] The standard used by the Third Circuit also differs from the standard used in the Fifth, Sixth, Seventh, Ninth, Tenth and Eleventh Circuits.

[6] This is not a case of First Amendment protection for lewd, vulgar, indecent and plainly offensive speech in school and therefore the holding of *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986) does not apply. Nor is this a case of

(Continued on following page)

*Tinker* Court held that school authorities may regulate speech if they had reason to anticipate that the speech would substantially interfere with the work of the school or impinge upon the rights of other students. 393 U.S. at 508, 514.

In *Tinker*, the school authorities prohibited the wearing of arm bands by the students which symbolized a protest of the Vietnam War. *Id.* at 504. The speech was prohibited because the school had a fear of a disturbance from the wearing of the arm bands. *Id.* at 508. The school authorities, in *Tinker*, could not point to any evidence that the prohibition was necessary to avoid material and substantial interference with school work or discipline, and since the school could not demonstrate "any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises had, in fact, occurred" the prohibition was unconstitutional. *Id.* at 511, 514.

Petitioners established below what the Third Circuit described as a "record [which] clearly supports the District Court's finding that the Warren Hills public schools, particularly the high school, were afflicted with pervasive racial disturbances throughout the 2000 and 2001 school year." *Sypniewski*, 307 F.3d at 248 (emphasis added). Yet, based on a lifeless and cold record containing only affidavits, the Third Circuit struck down the Board's prohibition

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school sponsored speech and therefore *Hazelwood School District v. Kuhlmeier*, does not apply. 484 U.S. 260, 180 S.Ct. 562, 98 L.Ed.2d 592 (1988).

of the T-shirt. The Third Circuit also enjoined Petitioners from further enforcement of the racial harassment policy to prohibit the wearing of the Foxworthy T-shirt.

In so doing, the Third Circuit applied a more stringent standard than this Court has created for the regulation of speech in the school environment. The Third Circuit applied the following standard to school regulation of speech: the school

> **"must point to a *particular* and *concrete* basis for concluding that the association is strong enough to give rise to a well-founded fear of genuine disruption in the form of substantially interfering with school operations or with the rights of others."**

*Sypniewski*, 307 F.3d at 257.

The standard adopted by the Third Circuit in this case is more onerous than the standard set-out by this Court on school First Amendment cases. The Third Circuit first adopted this standard in *Saxe v. State College Area School District*, 240 F.3d 200 (3d Cir. 2001). In *Saxe*, the Third Circuit held that

> **"If a school can point to a well-founded expectation of disruption – especially one based on past incidents arising out of similar speech the restriction may pass Constitutional muster."**

*Saxe*, 240 F.3d at 212. The Third Circuit replaced this Court's standard of "reasonable forecast of disruption" with "well-founded fear of disruption." *Id.*

Since *Tinker*, First Amendment review in the school environment has been inconsistent across the nation. *See*

*e.g., Melton v. Young*, 465 F.2d 1332 (6th Cir. 1972), *cert. denied,* 411 U.S. 951, 93 S.Ct. 1926, 36 L.Ed.2d 414 (1973) (school had right to prohibit wearing of confederate flag where school reasonably anticipated a tense racial situation); *Denno v. School Board Volusia County Florida*, 218 F.3d 1267, 1275 (11th Cir. 1999), *cert. denied,* 531 U.S. 958, 1215 S.Ct. 382, 148 L.Ed.2d 295 (2000) (applied a balancing test between the school's reasonable fear of disruption with the students' freedom to advocate unpopular viewpoints against the school's interest in teaching the students the boundaries of social behavior, a "*Tinker-Fraser*" standard.); *Castorina ex rel. Rewt v. Madison County School Board*, 246 F.3d 536 (6th Cir. 2001) (applied the *Tinker* reasonable forecast of substantial disruption standard.) *Barnside v. Byars*, 363 F.2d 744 (5th Cir. 1966) (Before *Tinker*, the court applied a reasonable apprehension standard.); and *Karp v. Beckar*, 477 F.2d 171, 174 (9th Cir. 1973) (Students' rights to free speech may be abridged if the school has facts which might have reasonably have led school authorities to forecast substantial disruption of or material interference with school authorities.)

Subsequent to all the aforementioned cases came the Tenth Circuit's decision in *West v. Derby Unified School District No. 260*, 206 F.3d 1358 (2000), in which this Court *denied cert.*, 531 U.S. 825, 121 S.Ct. 71, 148 L.Ed.2d 35 (2000).

In *West*, the Tenth Circuit held, on less egregious facts than the case at bar, that "school officials [have] evidence from which they could reasonably conclude that possession and display of the confederate flag images . . . would likely

lead to a material and substantial disruption of school discipline." *West*, 206 F.3d at 1366. The Tenth Circuit clearly applied this Court's standard from *Tinker*.[7]

Notwithstanding *Tinker* and the concession by the Third Circuit that Petitioners' schools were clearly afflicted with "pervasive racial disturbances", the Third Circuit held based on a cold record comprised of affidavits and not testimony that the school board failed to:

> **"point to a particular and concrete basis for concluding the association [between the current conduct and past conduct] is strong enough to give rise to a well-founded fear of genuine disruption in the form of substantially interfering with school operations or with the rights of others."**

*Sypniewski*, 307 F.3d at 257. This standard has no precedent in case law and is a new creation of the Third Circuit expanding its own standard from *Saxe v. State College Area School District*, *supra*. This onerous standard makes it almost impossible for a school administrator to prohibit any school speech unless that same speech caused substantial disruption in the past. The terms "concrete basis" and "well-founded" cannot be found in any Supreme Court cases that have addressed this issue.

There is no other way to reconcile the split of authority between the Third Circuit and this Court and other circuits. This issue is extremely significant in light of the current situation in our schools across our Nation. Under

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[7] It must be emphasized that Petitioners adopted the identical policy as that upheld in *West*.

the Third Circuit rule, school officials cannot be effective in banning conduct similar to that which has caused problems in the past; they can only wait for specific conduct to cause a specific problem. This is not what *Tinker* had in mind.

## II. THE INCORRECT STANDARD APPLIED BY THE THIRD CIRCUIT IN THE CASE AT BAR RESULTED IN A DIFFERENT DECISION THAN THE TENTH CIRCUIT ON ALMOST IDENTICAL FACTS.

The Tenth Circuit, in *West*, was confronted with very similar facts and the same identical policy. Similar to the case at bar, in *West*, the school in response to incidents of racial tension between black and white students adopted a Racial Harassment and Intimidation policy. 206 F.3d 1358, 1361 (2000). Shortly after the adoption of the harassment policy a student was suspended for drawing a Confederate flag on a piece of paper during a math class. *Id.* at 1361. That student filed a lawsuit alleging that the policy violated the student's First Amendment free speech right; violated the student's Fourteenth Amendment right to due process; and was unconstitutionally vague and over-broad. *Id.* at 1361. In reviewing the school's action, the Tenth Circuit held that the school officials had evidence from which they could reasonably conclude that possession and display of the Confederate images would likely lead to a material and substantial disruption of school discipline. *West*, 206 F.3d at 1366.

The Tenth Circuit in *West* also reviewed the school's policy for vagueness and over-breath. *Id.* at 1366, 1367.[8] In *West*, the Plaintiff also mounted a facial challenge to the same identical policy as the policy in question, alleging that it was over-broad and vague. The Tenth Circuit in *West* concluded that the Harassment and Intimidation policy does not threaten protected speech and is not unconstitutionally over-broad, nor was it unconstitutionally vague. *West*, 206 F.3d 1368.

"Because of the wide reaching effects of striking down a law on its face at the request of one whose conduct may be punished despite the First Amendment, we have recognized that the over-breath doctrine is strong medicine and have imposed it with hesitation, and then, only as a last resort." *Los Angeles Police Department v. United Reporting Publishing Corp.*, 528 U.S. 38, 40, 120 S.Ct. 483, 488, 145 L.Ed.2d 451 (1999). In discerning the reach of the policy as previously stated, the over-breadth and vagueness arguments regarding this policy were specifically rejected in *West*. The fact that the Third Circuit did not reach the same result in this matter creates another split in the Circuits. There is no other way to resolve the split in the Circuits without this Court granting this Petition for Certiorari.

In fact, in the case at bar, the Third Circuit specifically rejected *West*. *Sypniewski*, 307 F.3d at 264. The Third Circuit stated that "by themselves, the limitations in *West*

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[8] In the case at bar, the Third Circuit also struck down a portion of the Board's policy, specifically the statement "ill will" stating that portion of the policy was over-broad.

do not appear to exclude all protected expression. Whether a student's conduct is willful does not necessarily alter its disruptive effects although it may bear on the fairness of sanction . . . and even when a symbol is actually displayed and actually causes ill will, it does not necessarily follow that substantial disruption will result." *Id.* Furthermore, in attempting to resolve the over-breadth doctrine the Third Circuit incorrectly relied upon and incorrectly quoted *Tinker*, i.e. "That is, if the speech at issue gives rise to a well-founded fear of disruption or interference with the rights of others." *Sypniewski*, 307 F.3d 264. The terms well-founded fear were not contained in the *Tinker* case but were in fact a creation of the Third Circuit.

## CONCLUSION

For the foregoing reasons, the petition for Writ of Certiorari should be granted.

Respectfully submitted,

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United States Court of Appeals,
Third Circuit.
Thomas **SYPNIEWSKI**, Jr.; Matthew **Sypniewski**;
Brian **Sypniewski**
v.
WARREN HILLS REGIONAL BOARD OF EDUCATION; Peter Merluzzi, in his personal and official capacity as Superintendent of the Warren Hills Regional Board of Education; Beth Godett, in her personal and official capacity as Principal of the Warren Hills Regional High School; Ronald Griffith; Phillip Chalupa, in their personal and official capacity as Vice Principals of Warren Hills Regional High School; Elizabeth Ames; Marcy Matlosz; Ray Busch; Suyling Heurich; James T. Momary; Nancy Fallen; William Miller; Bradley Breslin; Scott Schantzenbach, in their official capacity as members of the Warren Hills Regional Board of Education
Matthew Sypniewski; Brian Sypniewski, Appellants
No. 01-3542.
Argued March 4, 2002.
Filed Oct. 3, 2002.

Gerald Walpin, Esquire (Argued), Katten, Muchin, Zavis & Rosenman, New York, NY, for Appellants.

James W. Broscious, Esquire (Argued), Broscious, Glynn & Fischer, Washington, NJ, for Appellees.

Before: SCIRICA and ROSENN, Circuit Judges, and WARD, District Judge*.

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* The Honorable Robert J. Ward, United States District Judge for the Southern District of New York, sitting by designation.

## OPINION OF THE COURT

SCIRICA, Circuit Judge.

At issue is the constitutionality, both facially and as applied, of a public school's racial harassment policy against a background of demonstrated racial hostility. The specific issue is whether the public school's policy violates the First Amendment protection of students' rights to free expression.

### I.

The Warren Hills School District's racial harassment policy was enacted in response to a pattern of disturbing racial incidents. Shortly thereafter, Thomas **Sypniewski** was suspended from school for wearing a "Jeff Foxworthy" T-shirt inscribed with "redneck" jokes. Thomas **Sypniewski** filed this lawsuit (together with his brothers Matthew and Brian) mounting a facial and as applied challenge to the constitutionality of the harassment policy and dress code.[1]

The **Sypniewski** brothers named as defendants: the Warren Hills Regional Board of Education; Peter Merluzzi, the superintendent of the board of education; Beth Godett, the principal of the high school; Ronald Griffith and Philip

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[1] Thomas **Sypniewski** was a student at the Warren Hills Regional High School until June 15, 2001 (ten days before plaintiffs filed their complaint), when he graduated. Brian **Sypniewski** was a student at the Warren Hills Regional Middle School until June 2001. He entered the high school in September 2001. Matthew **Sypniewski** is a student at the high school and at the Warren County Technical School and is scheduled to graduate in 2004.

Chalupa, vice principals of the high school; and Elizabeth Ames, Bradley Breslin, Ray Busch, Nancy Fallen, Suyling Heurich, Marcy Matlosz, William Miller, James T. Momary, and Scott Schantzenbach, all members of the board of education.

Plaintiffs moved for a preliminary injunction against further enforcement of the racial harassment policy. The District Court denied the request for injunctive relief. Plaintiffs have appealed.

*a. Racial Hostility in the Warren Hills Schools.*

The first racial incident cited by the District Court occurred in October 1999 at the high school.[2] A white student dressed for Halloween "costume day" by wearing overall jeans and a straw hat and appearing in black face. He also wore a thick rope around his neck tied in a noose. The student was sent home and suspended. Also during that year, a high school student submitted a racial harassment complaint based on several students' wearing shirts bearing the Confederate flag.

The number of incidents grew during the 2000-2001 school year. Several students continued the practice of wearing clothing displaying the Confederate flag. Some formed a "gang-like" group known as "the Hicks," and observed "White Power Wednesdays" by wearing Confederate flag clothing. On Wednesday, September 20, 2000, a

[2] The District Court's opinion contains a comprehensive discussion of the racial troubles in the Warren Hills School District. *See* ***Sypniewski*** *v. Warren Hills Reg. Bd. of Ed.*, No. 01-3061, 5-22 & 32-37 (D.N.J. Sept. 4, 2001)

student walked down a main hallway in the high school waving a large Confederate flag. The flag was confiscated, but the student was not disciplined.

Several students complained about the flag waving incident to Ronald Griffith, a vice principal of the Warren Hills Regional High School. They also reported that some students were telling racially offensive jokes and disseminating racially offensive material downloaded from the Internet. Griffith spoke to two students involved in the events of September 20, who confirmed the existence of the Hicks and White Power Wednesdays. One of these students was suspended for possessing racially offensive materials.

Thomas **Sypniewski** acknowledges that he wore shirts displaying Confederate flags to school. In an October 4, 2000 local newspaper article about the Confederate flag at the high school, Thomas **Sypniewski** is pictured wearing a T-shirt displaying the text, "Not only *am I* perfect, I'm a Redneck too!" The word "redneck" is printed in such a way that a Confederate flag shows through the letters. Whether he was a member of the Hicks, however, is unclear. He denies it. The District Court expressly declined to make a finding on this issue. In any event, the record suggests he was at least friendly with members of the Hicks, a group that does not appear to have been formally organized. There is no evidence that the other two **Sypniewskis** were affiliated with the Hicks.

Vice Principal Griffith's investigation of these incidents revealed that the level of racial tension in the high school was significant. Many students were deeply offended by the actions of the Hicks and their friends. At least one student reported he "felt like" responding

violently. The District Court also found the racial tension spilled over into the classroom, displacing class lessons with discussions about racial relations. But neither Thomas **Sypniewski** nor the word "redneck" was specifically mentioned by the students Griffith interviewed.

On December 1, 2000, a white student recently enrolled at the high school was harassed at home. Apparently in response to this student's association with several African-American students, a large group of teenagers drove to his house where they physically threatened the student and called him a "nigger lover," among other expletives.

White Power Wednesdays continued. Some high school students wore clothing bearing the Confederate flag throughout the fall and winter. A student came to school with a large Confederate flag draped over the back of his truck. Numerous instances of racist graffiti were found on school walls, some of which inspired hostile graffiti responses. On one occasion, some students played a dehumanizing, racist song from their trucks in the parking lot. Near the end of the school year, a fight occurred between a black student and a white student that resulted in one student sustaining a concussion and requiring stitches. And according to Superintendent Merluzzi, several students continued to engage in other "racially harassing behavior."

In short, the record clearly supports the District Court's finding that the Warren Hills public schools – particularly the high school – were afflicted with pervasive racial disturbances throughout the 2000-2001 school year.

*b. The School Board's Response.*

The racial difficulties at the high school began to attract the attention of the community early on. The school board responded by placing the issue of Confederate flag clothing on the agenda of its regularly scheduled meeting on October 3, 2000. Several parents spoke on both sides of the issue, including both **Sypniewski** parents, who spoke against a proposed Confederate flag ban.

Superintendent Merluzzi also spoke at the meeting. Expressing concern for the students' free speech rights, he stated his view that the problem was limited to a sufficiently small number of students that it could be dealt with without adopting policy changes such as banning the Confederate flag. In particular, Merluzzi noted the existence of a peer mediation program, which he thought adequate to deal with many of the racial problems. The board of education shared Merluzzi's reluctance to implement a formal policy at that time, and instead resolved to investigate its options.

On October 20, 2000, Timothy Downs, the school district's Peer Mediation Coordinator, issued an internal report containing several findings concerning the racial strife at the high school during the preceding month.[3]

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[3] In particular, the report includes the following findings:

1. There is a sizable number of students, both minority and majority, who feel offended, threatened, uncomfortable and discriminated against by the displaying of the Confederate flag in non teaching capacities.

2. There is strong evidence that a demonstration of "white power" was the intention of the boy who displayed the flag [in the hallway on September 20, 2000].

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Based in part on these findings, Downs reached a conclusion different from that expressed by Superintendent Merluzzi at the October 3, 2000 board meeting. The report stated, "At this time this issue is too complex, involves too many people, and is too controversial for Peer Mediation Services." The report recommended that "[t]he wearing of the Confederate flag for non instructional purposes should be disallowed in the Warren Hills Regional School District."

By February 2001, after several months of continued racial problems, including regular wearing of clothing decorated with the Confederate flag and the off campus incident of December 1, the school district changed its view on the necessity of implementing a formal policy. According to Superintendent Merluzzi, "It was the consensus of the Board of Education and myself that there had been significant disruption in the school and that the minority population was at significant risk from, not only verbal and intimidating harassment but also, increasingly, the risk of physical violence."

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3. The students who consider themselves members of the clique known as the "Hicks" share a common belief in prejudicial feelings towards others.

4. The "Hicks" celebrate "White Wednesday" by wearing teeshirts as a symbol of solidarity. The shirts of choice have a representation of the Confederate flag in some form or fashion.

5. One of the students involved in the flag demonstration downloaded racially offensive literature from the internet from a web site called "whitesonly.com" and distributed these materials to the students in the school community.

The school board researched racial harassment policies that had been adopted by other school districts and selected a policy that had passed constitutional muster before the Court of Appeals for the Tenth Circuit. *West v. Derby Unified Sch. Dist. No. 260,* 206 F.3d 1358 (10th Cir.2000). The adopted policy reads, in part:

> District employees and student(s) shall not racially harass or intimidate other student(s) or employee(s) by name calling, using racial or derogatory slurs, wearing or possession of items depicting or implying racial hatred or prejudice. District employees and students shall not at school, on school property or at school activities wear or have in their possession any written material, either printed or in their own handwriting, that is racially divisive or creates ill will or hatred. (Examples: clothing, articles, material, publications or any item that denotes Ku Klux Klan, Arayan [sic] Nation-White Supremacy, Black Power, Confederate flags or articles, Neo-Nazi or any other "hate" group. This list is not intended to be all inclusive.)
>
> As part of the instructional process, professional staff may display and discuss divisive materials and/or symbols when selected and used to enhance knowledge, provided these topics are included in the approved Warren Hills Regional Schools curriculum. Said materials must be removed from display daily.[4]

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[4] The Warren Hills policy and the one at issue in *West* are substantively identical except for the addition, in the Warren Hills policy, of the second paragraph quoted.

The board presented the proposed policy at its meeting on February 20, 2001, and adopted it on March 6, for implementation on March 13, 2001. As noted, racially controversial incidents occurred until the end of the school year, including at least one student wearing clothing displaying the Confederate flag despite the ban.

c. *The Jeff Foxworthy T-Shirt.*

Each of the three **Sypniewski** boys owned a T-Shirt featuring the humor of Jeff Foxworthy. Brian **Sypniewski** had purchased the three shirts at Wal-Mart in September 1999. The T-Shirts contained the following text:

Top 10 reasons you might be a Redneck Sports Fan if . . .

10. You've ever been shirtless at a freezing football game.

9. Your carpet used to be part of a football field.

8. Your basketball hoop used to be a fishing net.

7. There's a roll of duct tape in your golf bag.

6. You know the Hooter's [sic] menu by heart.

5. Your mama is banned from the front row at wrestling matches.

4. Your bowling team has it's [sic] own fight song.

3. You think the "Bud Bowl" is real.

2. You wear a baseball cap to bed.

1. You've ever told your bookie "I was just kidding."

The T-shirt is fairly representative of Foxworthy's "country humor." Foxworthy has produced several books and compact discs with names such as, "You Might Be a Redneck if," "Blue Collar Comedy Tour," "Games Rednecks Play," and "Hick is Chic." His Internet website features a "Redneck Joke of the Day." http://www.jefffoxworthy.com. The term "redneck" appears throughout Foxworthy's work.

Plaintiffs stress the mainstream appeal of Foxworthy's humor, noting he starred in his own situation comedy, the "Jeff Foxworthy Show," on network television for two seasons. Foxworthy also appeared on a television special that featured President George W. Bush. He currently has a syndicated radio show, "The Foxworthy Countdown," where he plays country music and tells jokes. He has been featured on a line of greeting cards. And as noted, the T-shirts worn by the **Sypniewskis** were purchased at Wal-Mart.

Each of the **Sypniewski** boys had worn the shirt to their respective schools[5] several times during the 2000-2001 school year. Thomas had also worn his shirt several times the previous year. There is no evidence that any student or administrator objected to the T-shirt at any time, or that it caused any disruption before the adoption of the racial harassment policy.

On March 22, 2001, Thomas **Sypniewski** wore the T-shirt to school for the first time after the implementation of the harassment policy. He wore the shirt without incident until last period of the day, when he was directed

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[5] *See* note 1, *supra*.

to Vice Principal Griffith's office by Neil Corley, a security guard at the high school. What occurred at that time between Thomas **Sypniewski** and Corley is disputed. In his report, Corley stated, "Tommy said something to the effect 'I've been waiting all day for someone to notice.'" Thomas **Sypniewski** is quoted in the local newspaper as saying, "The thought crossed my mind that this is going to piss people off." Defendants contend these statements demonstrate that Thomas **Sypniewski** intended wearing the shirt to be a provocative act. Thomas **Sypniewski** denies making both statements. Instead, he claims to have said to Corley, "This is the last period of the day. I've been walking around all day and now you've noticed" and intended to send no message related to race. The District Court did not resolve this factual dispute.

Vice Principal Griffith told Thomas **Sypniewski** the shirt violated the school dress code[6] – a policy that had

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[6] The dress code provides:

> Students also have the responsibility to dress appropriately and to keep themselves, their clothes and their hair clean. School officials may impose limitations on student participation in the regular instructional program where there is evidence that inappropriate dress causes disruption in the classroom and the lack of cleanliness constitutes a health or safety hazard or disruption of the educational program. The following is considered inappropriate for school:
>
> a) Clothing displaying or imprinted with nudity, vulgarity, obscenity, profanity, double entendre pictures or slogans (including those related to alcohol, drugs and tobacco), or portraying racial, ethnic, or religious stereotyping.
>
> b) Flip-flops, thongs, and other hazardous footwear.
>
> c) Clothing which has been intentionally torn, cut, or ripped in a fashion which displays the anatomy.

(Continued on following page)

been in place prior to disturbances that gave rise to the decision to adopt the racial harassment policy. Vice Principal Griffith stated he viewed the shirt as violating the code for several reasons. The references to the Bud Bowl[7] and Hooters restaurant,[8] he said, violated prohibitions on mentioning alcohol and sexual innuendo. His primary concern, however, was the appearance of the word "redneck" on the shirt "because of the troubling history of racial tension at our school and the possibility that the term 'redneck' would incite some form of violence and at a minimum be offensive and harassing to our minority population." Griffith gave Thomas **Sypniewski** the option of turning the shirt inside out. When Thomas refused, Griffith suspended him for three days. Apparently wishing to refrain from imposing the stiffer penalties associated with the racial harassment policy, Vice Principal Griffith did not mention the harassment policy as a basis for his

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d) Spandex garments without additional outer clothing.

e) Any clothing deemed gang-related, including the way the clothing is worn.

f) Gym-type apparel, clothing intended as undergarments worn as outer garments, or see-through garments without appropriate undergarments.

g) Street coats, windbreakers, and head coverings worn in the building. These items should be placed in lockers immediately upon arrival. Exceptions for medical or religious reasons must be referred to the principal.

h) Bare midriff clothing.

[7] The Bud Bowl is a fictional football game between bottles of beer used in a beer advertising campaign.

[8] Hooters is a national restaurant chain that liberally employs sexuality in its marketing.

action, even though he viewed the shirt as prohibited by that policy as well.

The following day, Brian **Sypniewski** wore his Foxworthy shirt to the middle school. The vice principal of the middle school, Robert Griffin, told Brian he had spoken with Superintendent Merluzzi, and that they had determined the shirt was neither offensive nor in violation of the dress code.

On March 26, 2001, Thomas **Sypniewski** appealed his suspension to the board of education. The board denied the appeal and upheld the suspension. As had Vice Principal Griffith, the board based its decision on the dress code and insubordination – not on the racial harassment policy. Apparently referring to Brian **Sypniewski's** wearing the shirt without penalty, the board stated "in hindsight action should have been taken with respect to this incident as well."

As noted, some racially provocative behavior continued through the end of the school year, despite implementation of the racial harassment policy. Shortly after Thomas **Sypniewski** graduated from the high school, he and his brothers filed this lawsuit.

*d. This Action.*

In their complaint, plaintiffs sought to preliminarily enjoin enforcement of both the racial harassment policy and the dress code as unconstitutional restrictions on students' freedom of speech under the First and Fourteenth Amendments to the Constitution, and under the New Jersey Constitution, Article I, Section 6. They also sought damages for actions taken against Thomas

**Sypniewski**, alleging unlawful suspension under both the United States and New Jersey Constitutions, as well as claims for defamation and "false light" under New Jersey law. The District Court denied plaintiffs' motion for a preliminary injunction with respect to the racial harassment policy, but found "the challenged portion of the Dress Code may not satisfy constitutional standards and should therefore not be enforced prospectively during the pendency of this litigation against the wearing of clothing which violates the Racial Harassment Policy." ***Sypniewski***, No. 01-3061, at 75. Plaintiffs have appealed the court's order that the racial harassment policy is consistent with plaintiffs' – and other students' – constitutional rights.[9]

Because this is an appeal from a denial of a motion for preliminary injunction, our review is limited to the prospective relief the District Court refused to grant.[10] Thus, our sole concern is whether the Warren Hills School District can continue constitutionally to enforce the racial harassment policy. Because Thomas **Sypniewski** has graduated and has left the reach of the school district's policies, he is not a party to this appeal.

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[9] The constitutionality of the dress code policy has not been raised on appeal.

[10] The order appealed is not a final order. Nonetheless, we have jurisdiction over this appeal under 28 U.S.C. § 1292(a)(1), which grants appellate jurisdiction over "[i]nterlocutory orders of the district courts of the United States . . . granting, continuing, modifying, refusing, or dissolving injunctions. . . ."

## II.

We employ a tripartite standard of review for refusals to issue preliminary injunctions. We review the District Court's findings of fact for clear error. Legal conclusions are assessed de novo. The ultimate decision to grant or deny the injunction is reviewed for abuse of discretion. *Highmark, Inc. v. UPMC Health Plan, Inc.*, 276 F.3d 160, 170 (3d Cir.2001).

In determining the appropriateness of issuing a preliminary injunction, four factors must be considered: "(1) whether the movant has a reasonable probability of success on the merits; (2) whether the movant will be irreparably harmed by denying the injunction; (3) whether there will be greater harm to the nonmoving party if the injunction is granted; and (4) whether granting the injunction is in the public interest." *Id.* at 171. The litigants have briefed in depth only the first requirement: whether the **Sypniewskis** have a reasonable probability of success on the merits. Because this is the essential element at issue here, we will focus our discussion on plaintiffs' likelihood of success on the merits of their constitutional claims.

## III.

Plaintiffs contest the constitutionality of the racial harassment policy both facially and as applied. Contending the policy is both unconstitutionally vague and overbroad on its face, plaintiffs maintain it should be struck down in its entirety. Because we are only concerned here with prospective violations, plaintiffs' challenge to the application of the policy to Thomas **Sypniewski's** wearing the shirt on March 22, 2001 is not before us. But plaintiffs seek an injunction against further enforcement of the

racial harassment policy to ban the Foxworthy shirt, which both Matthew and Brian – who remain in the school system – still own.

*a. Freedom of Speech in Public Schools.*

The public school setting demands a special approach to First Amendment disputes. Most students are minors, and school administrators must have authority to provide and facilitate education and to maintain order. The Supreme Court "has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). On the other hand, "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.* at 506, 89 S.Ct. 733. Thus, students retain the protections of the First Amendment, but the shape of these rights in the public school setting may not always mirror the contours of constitutional protections afforded in other contexts.

In *Tinker*, school officials prevented a group of students from wearing black armbands to express their opposition to our country's participation in the war in Vietnam. The Court upheld the students' right to do so because there was "no evidence whatever of petitioners' interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be left alone." *Id.* at 508, 89 S.Ct. 733. Responding to the school authorities' attempt to justify their action by reason of a concern about the possibility of the armbands'

creating a disturbance in school, the Court held that "in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Id.* By contrast, "conduct by the student, in class or out of it, which for any reason – whether it stems from time, place, or type of behavior – materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech." *Id.* at 513, 89 S.Ct. 733. "As subsequent federal cases have made clear, Tinker requires a specific and significant fear of disruption, not just some remote apprehension of disturbance." *Saxe v. State Coll. Area Sch. Dist.,* 240 F.3d 200, 211 (3d Cir.2001). In sum, "if a school can point to a well-founded expectation of disruption – especially one based on past incidents arising out of similar speech – the restriction may pass constitutional muster." *Id.* at 212.

Following *Tinker*, the Supreme Court decided two other major cases implicating freedom of expression in public schools. In *Bethel School District No. 403 v. Fraser,* 478 U.S. 675, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986), a school disciplined a student for a student government nominating speech filled with sexual metaphor viewed by the school and the Court as lewd. The Court upheld the school's authority to do so because of "society's . . . interest in teaching students the boundaries of socially appropriate behavior." *Id.* at 681, 106 S.Ct. 3159. Schools are not prevented by the First Amendment from encouraging the "fundamental values of 'habits and manners of civility,'" *id.* at 681, 106 S.Ct. 3159, by "insisting that certain modes of expression are inappropriate and subject to sanctions." *Id.* at 683, 106 S.Ct. 3159. And "[t]he determination of what manner of speech . . . is inappropriate properly rests

with the school board." *Id.* We have interpreted *Fraser* as establishing that "there is no First Amendment protection for 'lewd,' 'vulgar,' 'indecent,' and 'plainly offensive' speech in school.'" *Saxe*, 240 F.3d at 213.

*Hazelwood School District v. Kuhlmeier,* 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988), involved the authority of school officials to control the content of a student newspaper. The Court upheld the school's deletion of an article from the newspaper primarily because the newspaper was sponsored by the school. "[E]ducators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Id.* at 273, 108 S.Ct. 562.

Defendants do not contend the Foxworthy shirt contained indecent language; nor was the shirt school-sponsored. Accordingly, under *Saxe*, the shirt "is subject to *Tinker*'s general rule: it may be regulated only if it would substantially disrupt school operations or interfere with the right of others." *Saxe*, 240 F.3d at 214. Like the armbands at issue in *Tinker, the wearing of the T-shirt was "akin to 'pure speech,'" targeted for its expressive content.* 393 U.S. at 508, 89 S.Ct. 733.

*b. Banning the Foxworthy T-shirt.*

Several cases have addressed public schools' attempts to restrict displays of the Confederate flag under *Tinker*. Where there have been racial problems involving the Confederate flag, courts have found such bans constitutional. *See West*, 206 F.3d at 1366; *Melton v. Young,* 465 F.2d 1332, 1335 (6th Cir.1972); *Phillips v. Anderson*

*County Sch. Dist. 5,* 987 F.Supp. 488, 493 (D.S.C.1997). In the absence of such evidence, courts have concluded that school authorities have failed to establish a sufficient likelihood of disruption to support banning the flag. *See Castorina ex rel. Rewt v. Madison County Sch. Bd.,* 246 F.3d 536, 542 (6th Cir.2001) (reversing summary judgment for school officials where there was no showing of disruption); *Denno v. Sch. Bd.,* 182 F.3d 780, 785 (11th Cir.1999) ("noting the absence of any facts in the complaint that would suggest a reasonable fear of disruption"), *vacated and decided on separate grounds*, 218 F.3d 1267 (2000).

Here, there is substantial evidence of prior disruption related to the Confederate flag. The District Court's factual findings would likely support a ban of displays of the Confederate flag under *Tinker*. The "comprehensive authority of . . . school officials . . . to prescribe and control conduct in the schools" would permit Warren Hills officials to prohibit the display of symbols whose display has had the purpose and effect of provoking disruption in school. *Tinker*, 393 U.S. at 507, 89 S.Ct. 733. But Plaintiffs have not challenged a ban on the Confederate flag; they challenge the banning of a T-shirt that bore no Confederate flag and had no similarly disruptive history. The evidence shows the Foxworthy T-shirt was worn several times without incident. On March 22, 2001, when Thomas **Sypniewski** wore the shirt, it created no disruption in the high school for nearly the entire day, until the last period, when he was sent to Vice Principal Griffith's office not because of disruption, but because of the view of a security guard that the shirt might violate the dress code or the racial harassment policy. Furthermore, the day after

Thomas **Sypniewski's** suspension, school officials determined the shirt was not offensive when worn by Brian **Sypniewski**.

While the history of the **Sypniewskis** wearing the T-shirt speaks strongly against a finding of likelihood of disruption, it is not necessarily the case that school officials could never regulate it. There may be other bases for a "well-founded expectation of disruption." *Saxe*, 240 F.3d at 212. If so, the school district had "the power to act to prevent problems before they occurred; it was not limited to prohibiting and punishing conduct only after it caused a disturbance." *West*, 206 F.3d at 1367. In *Saxe*, we noted that an expectation of disruption will most likely be "well-founded" where there have been "past incidents arising out of similar speech."[11] 240 F.3d at 212. There were, of course, serious disruptive incidents in the Warren Hills schools over the two years before the decision to ban the Foxworthy T-shirt that justified banning a range of related expression. But we must determine whether that range is broad enough to encompass the Foxworthy T-shirt. The question is whether those incidents involved sufficiently "similar" – or otherwise related – speech to permit an inference of substantial disruption from the T-shirt.

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[11] While such evidence will most often be needed to show that an expectation of disruption is well-founded, there may be cases in which it is not required. The high school was likely justified in disciplining the student dressed in black face, wearing a rope around his neck, whether or not they could point to anything similar in the past. The Foxworthy T-shirt, however, is clearly not in this category. It is essentially harmless on its face.

Defendants contend the shirt was offensive – and consequently potentially disruptive – because in the context of the racial troubles in the Warren Hills schools, the word "redneck" had come to connote racial intolerance. They maintain the word "redneck" was directly associated with the Hicks and with the ongoing racial harassment. They also contend the word "redneck" is sufficiently related to words and symbols associated with the racial hostilities that the school authorities were entitled to expect that a shirt bearing that word would disrupt school functions.

Defendants claim the word "redneck" was an identifier of the Hicks, or an alternate name for the Hicks. If this is correct, then one should analyze clothing bearing the word "redneck" as one would clothing bearing the word "hick" or the Confederate flag. All had become, on defendants' view, gang signifiers. As such, the school district believed it was well within its rights to ban this clothing as a way of limiting gang-like activity in the schools.[12]

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[12] Plaintiffs maintain that even if the words and symbols were signifiers of the Hicks, there is no direct evidence that their wearing the T-shirt had or would cause any disruption. Such a showing, they argue, is required to justify a ban. In support of this position, plaintiffs cite *Chalifoux v. New Caney Independent School District,* 976 F.Supp. 659 (S.D.Tex.1997), a case discussed favorably by this court in *Saxe*, 240 F.3d at 211-12. In *Chalifoux*, the school banned rosary beads as gang symbols. Two students neither affiliated with nor identified as members of the gang in question wore rosaries for religious purposes, but were disciplined. The court found the students could not be prevented from wearing the rosaries under those circumstances. 976 F.Supp. at 667.

The facts here are somewhat different. First, the rosaries at issue in *Chalifoux* implicated the religious freedom of the plaintiffs. *Id.* at 665. Second, in *Chalifoux*, it was clear that plaintiffs were not gang

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At best, the evidence is conflicting with respect to the direct association of the term "redneck" with the racial hostility and the troublemakers. There is little doubt the racial incidents involved a group known as "the Hicks." Both Superintendent Merluzzi and Vice Principal Griffith averred the group was also known as "the Rednecks." But there is no other evidence of that label being used for the Hicks. An editorial in the student newspaper, in October 2000, stated that Thomas **Sypniewski** associated the Confederate flag "with the words 'red-neck' and 'hick' (a term by which he and his friends refer to themselves.)" While this statement draws a connection between the two terms, it seems to imply that only "hick" is the term by which the students referred to themselves. At best the reference is ambiguous. By contrast, the gang-like group is called "the Hicks" in numerous references in the record. More importantly, the District Court made no finding that the group was ever known as the "Rednecks." Instead, assuming the group was known only as the "Hicks," the District Court relied on the relationship between the word "redneck" and the word "hick" to find that "redneck" was potentially disruptive. On this record, and in the absence of a finding by the District Court, we see no basis for concluding that the Hicks were also known as "the Rednecks." Therefore, defendants have not established their ability to ban the shirt as a gang or quasi-gang symbol.

Similarly, there is little or no evidence that the word "redneck" had been used to harass or intimidate, or

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members, and there was no reason for anyone to think otherwise. *Id.* at 663. The record here does not reveal a similarly clear disassociation. *See supra*, at 4.

otherwise to offend. Although on prior occasions, Thomas **Sypniewski** wore a shirt on which the word "redneck" appeared overlaid with the Confederate flag, the appearance of the word on the T-shirt with a flag does not make the word offensive. It is apparent from the record that students wearing Confederate flag clothing wore a variety of garments. Some may have displayed musicians, as did the T-shirt at issue in *Castorina,* 246 F.3d at 538 (T-shirt with Confederate flag and country music artist Hank Williams, Jr.). But that alone would not make the musician into a prohibited symbol. There is no suggestion in the record that any part of the Confederate flag clothing other than the flag itself was seen as a provocative and offensive symbol. In short, there is little if any history of the use of the word "redneck" itself that would support its ban.

Because of this, the District Court did not base its decision on the history of the use of the word "redneck" in Warren Hills schools. Instead, the District Court found justification for its ban in its "similarity" to the word "hick" and to the Confederate flag:

> [T]he term "hick," which is a label for the group responsible for such occurrences as White Power Wednesdays, is quite similar to the term "redneck." This similarity is the case even if Thomas understands "hick" to mean a farmer as well as "redneck" to mean "a non-sophisticated person who likes to work and play in the outdoors". . . . It also exists regardless of any appropriate use of the term "redneck" in the general culture. The Court further finds similarities between the banned Confederate flag and the term "redneck" as well, indicated, for instance, by German's complaint about a shirt with both the words

> "redneck" and a Confederate flag. . . . These findings, given the similarity between the Confederate flag and the term "redneck," would also justify the banning of the term "redneck" as it appears on the Foxworthy T-shirt. Given the past history at the High School and the similarity between the word "redneck" and past incidents, the Court concludes that Plaintiffs have not demonstrated a sufficient probability of success as to the prohibition of the Foxworthy T-shirt under the *Tinker* substantial disruption standard. . . .

***Sypniewski***, No. 01-3061,at 68-70.

With respect to the word "hick," the District Court focused on definitional similarity, noting that *Webster's Third New International Dictionary* defines a "redneck" as "a white member of the Southern rural laboring class," and defines a "hick" as "an awkward, rude, unsophisticated, or provincial person." *Id.* at 68 n. 23. It may be that, at least in some of their uses, the words "redneck" and "hick" have similar meanings. At least one thesaurus lists "hick" as a synonym of "red-neck." *Merriam-Webster Collegiate Thesaurus*. But that same thesaurus also lists "rustic," "bumpkin," "hillbilly," and "peasant," among others. Id. There is no reason to believe that any of these terms might cause a disturbance.

The offensiveness of "hick" in the present context derives not from its meaning,[13] but from its relationship to the gang-like group, the Hicks. Other words do not

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[13] Both "hick" and "redneck" can be used disparagingly, of course. But when they are used in this way, they offend the people labeled "hick" or "redneck."

necessarily become offensive by being synonymous with such symbols. A word might well become offensive if it also served as an identifier of the Hicks (or a similar group), or as a promoter of the Hicks' disruptive behavior. Ultimately, then, "redneck" and "hick" must be "similar" not definitionally, but with respect to their associations with a disruptive group and its disruptive behavior. This is a kind of similarity that might support an inference of disruption. Otherwise, we would be required to conclude that the school could also ban "hillbilly," "peasant," and the like.

It could be argued that the synonymity of the words is relevant insofar as they both imply, in certain of their uses, racial intolerance and bigotry. The wearing of the Foxworthy T-shirt, then, might be seen as a veiled celebration of bigotry. But there is no evidence that "redneck" had or has such a meaning in the Warren Hills schools. The evidence reveals a history of unproblematic use of the word, and that it was not associated to a significant degree with the Hicks or with their behavior. The most that could be said, given the District Court's findings on this issue, is that "redneck" might come to be offensive. Yet this does not amount to a well-founded fear of disturbance, but merely an undifferentiated fear or remote apprehension of disturbance. *See Tinker*, 393 U.S. at 508, 89 S.Ct. 733.

It may be argued the school was entitled to conclude the T-shirt was likely to lead to disruption because Thomas **Sypniewski's** wearing of the shirt amounted to a promotion of values consistent with the items and activities that had caused racial unrest. Again, mere association is not enough. Arguably, this reasoning could encompass country music and any number of things identifiably "country." The First Amendment would have little meaning if schools could go that far.

Where a school seeks to suppress a term merely related to an expression that has proven to be disruptive, it must do more than simply point to a general association. It must point to a particular and concrete basis for concluding that the association is strong enough to give rise to well-founded fear of genuine disruption in the form of substantially interfering with school operations or with the rights of others. In other words, it is not enough that speech is generally similar to speech involved in past incidents of disruption, it must be similar in the right way. Most commonly, the prior speech will have carried an offensive or provocative meaning, and the similar speech will have a similar meaning. But this sense of "similarity" cannot justify the ban here. The most plausible kind of similarity that would permit such an inference would be that the word "redneck" was akin to a gang symbol identifying the Hicks, or clearly promoting their activities. But as discussed, the record does not support such a conclusion, and the District Court made no such finding. On this record, therefore, plaintiffs have established a likelihood of success on the merits of their First Amendment claim with respect to the Foxworthy T-shirt. The District Court erred in employing too broad a notion of "similarity" – a conception that does not provide a sufficient basis for permitting a "well-founded" inference of disruption.

In order to grant a preliminary injunction, the District Court must also assess whether either party would suffer irreparable injury as a result of granting or denying the injunction, the balance of the hardships, and the public interest.

Both sides have plausible claims for irreparable injury. A student whose protected expression is stifled suffers an injury that cannot be undone. And if the school

is unable to enforce a policy it needs to provide education and to maintain discipline, the disruption of education or the invasion of other students' rights cannot be reversed. Both kinds of injuries are substantial. Thus, neither the irreparability of the injuries nor the balance of the injuries modifies the outcome in any significant way. Finally, the public interest demands respect for both constitutional rights and effective education. For these reasons, the likelihood of success on the merits determines the result of the analysis.

The District Court erred in denying the preliminary injunction sought against enforcement of the racial harassment policy to prohibit the wearing of the Foxworthy T-shirt.

c. *Facial Challenge to the Harassment Policy.*

In addition to challenging the racial harassment policy as applied to the Foxworthy T-shirt, plaintiffs maintain it should be struck down in its entirety for several reasons. First, plaintiffs argue the policy as a whole is facially overbroad. A policy regulating expression can be struck down entirely if it proscribes a significant amount of constitutionally protected speech. Second, they contend the policy is so vague as to be facially unconstitutional. A sufficiently vague policy may fail to put students on fair notice of what is prohibited and provides insufficient standards for enforcement. Finally, plaintiffs maintain the policy is unconstitutional insofar as it amounts to content-based discrimination.

*i. Overbreadth.*

A regulation of speech[14] may be struck down on its face if its prohibitions are sufficiently overbroad – that is, if it reaches too much expression that is protected by the Constitution. The harassment policy can be found unconstitutionally overbroad if "there is a 'likelihood that the statute's very existence will inhibit free expression'" to a substantial extent. *Saxe*, 240 F.3d at 214 (quoting *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 799, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984)).

In most cases, courts will not assess the constitutionality of a provision apart from its particular applications. But cases involving freedom of speech are frequently excepted from this general rule. *Los Angeles Police Dept. v. United Reporting Publ'g Corp.*, 528 U.S. 32, 38, 120 S.Ct. 483, 145 L.Ed.2d 451 (1999). The exception, however, is a narrow one:

> Even though the challenge be based on the First Amendment, the overbreadth doctrine is not casually employed. "Because of the wide-reaching effects of striking down a statute on its face at the request of one whose own conduct may be punished despite the First Amendment, we have recognized that the overbreadth doctrine is 'strong medicine' and have employed it with hesitation, and then 'only as a last resort.'"

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[14] While the harassment policy may be said to regulate conduct, it clearly regulates speech, insofar as it specifically targets certain expression.

*Id.* at 39, 120 S.Ct. 483 (quoting *New York v. Ferber,* 458 U.S. 747, 769, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982)). Accordingly, most cases alleging unconstitutional enforcement of a public school's disciplinary policies, like other laws, "are best addressed when (and if) they arise, rather than prophylactically through the disfavored mechanism of a facial challenge." *City of Chicago v. Morales,* 527 U.S. 41, 111, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999) (Thomas, J., dissenting). For these reasons, courts will not strike down a regulation as overbroad unless the overbreadth is "substantial in relation to the [regulation's] plainly legitimate sweep." *Broadrick v. Oklahoma,* 413 U.S. 601, 615, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973).

Furthermore, in response to an overbreadth challenge, a policy can be struck down only if no reasonable limiting construction is available that would render the policy constitutional. *Saxe,* 240 F.3d at 215. "[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Id.* (quoting *Stretton v. Disciplinary Bd. of the Supreme Court,* 944 F.2d 137 (3d Cir.1991)); *see also Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 494 n. 4, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982). A court, however, "will not rewrite a . . . law to conform it to constitutional requirements." *Virginia v. Am. Booksellers Ass'n, Inc.,* 484 U.S. 383, 397, 108 S.Ct. 636, 98 L.Ed.2d 782 (1988); *Reno v. ACLU,* 521 U.S. 844, 884-85, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997). Accordingly, we must determine whether the relatively broad language of the policy can reasonably be viewed narrowly enough to avoid any overbreadth problem.

Because of the duties and responsibilities of the public elementary and secondary schools, the overbreadth doctrine warrants a more hesitant application in this setting

than in other contexts. There are important reasons for this. First, *Tinker* acknowledges what common sense tells us: a much broader "plainly legitimate" area of speech can be regulated at school than outside school. Speech that disrupts education, causes disorder, or inappropriately interferes with other students' rights may be proscribed or regulated. 393 U.S. at 513, 89 S.Ct. 733. Everyday school discipline does not depend on the necessity of a speech code. In the public school setting, the First Amendment protects the nondisruptive expression of ideas. It does not erect a shield that handicaps the proper functioning of the public schools. [15]

This fact is also recognized by New Jersey law. By statute, school authorities are required to "hold every pupil accountable for disorderly conduct," and any student who disobeys a school official may be subject "to punishment and to suspension or expulsion from school." N.J. Stat. Ann. § 18A:25-2, 37-2. Accordingly, expression that constitutes "disorderly conduct" is proscribed by New Jersey law and can result in discipline including suspension. It is apparent, therefore, that most racially hostile conduct could be regulated and punished even without a racial harassment speech code, so long as it is disruptive.[16] Though not generally necessary, more specific provisions can serve an important purpose. A school might conclude a

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[15] The Supreme Court has recognized that schools have a "compelling interest in having an undisrupted school session conducive to the students' learning." *Grayned v. City of Rockford,* 408 U.S. 104, 119, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972).

[16] As we discuss, even in the public school context, mere offensiveness does not qualify as "disruptive" speech.

generic policy would have less value in guiding school children's behavior. The broad authority to control the conduct of students granted to school officials permits a good deal of latitude in determining which policies will best serve educational and disciplinary goals.

Also, the demands of public secondary and elementary school discipline are such that it is inappropriate to expect the same level of precision in drafting school disciplinary policies as is expected of legislative bodies crafting criminal restrictions. *Cf. Fraser*, 478 U.S. at 686, 106 S.Ct. 3159 ("Given the school's need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process, the school disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions.") (discussing vagueness). New Jersey Board of Education regulations provide that "[e]ach district board of education shall develop and implement a code of conduct for establishing school standards and rules which define acceptable student behavioral expectations and which govern student behavior." N.J. Admin. Code tit. 6A § 16-5.1. The Warren Hills code is typical in its generality, requiring that students "at all times conduct themselves in a manner that is cooperative, respectful, and responsive to staff and administration." Warren Hills Regional High School Student/Parent Handbook 2002-2003, at 19. The code prohibits, among other behaviors, "abusive language," "[i]nsubordination," "disrespect towards a staff member or other adult in the building," and "[a]ny unlisted offense to be decided by an administrator." *Id.* at 20. Determining the appropriate level of detail in a school disciplinary code is largely left to school officials.

Yet there is another important consideration here. Speech codes are disfavored under the First Amendment because of their tendency to silence or interfere with protected speech. *See, e.g., Saxe*, 240 F.3d at 207 ("This sort of content- or viewpoint-based restriction is ordinarily subject to the most exacting First Amendment scrutiny."); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1182-84 (1995); *cf. R.A.V. v. City of St. Paul*, 505 U.S. 377, 391, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992) (bias-motivated disorderly conduct statute). But for the reasons discussed, public secondary and elementary school administrators are granted more leeway than public colleges and universities or legislative bodies, *e.g.*, municipalities, states, and Congress. Accordingly, a school disciplinary policy will be struck down as overbroad only after consideration of the special needs of school discipline has [sic] been brought to bear together with the law's general hesitation to apply this "strong medicine."

We now turn to the challenged racial harassment policy.[17] The Warren Hills Harassment Policy prohibits

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[17] Here again is the relevant portion of the harassment policy:

> District employees and student(s) shall not racially harass or intimidate other student(s) or employee(s) by name calling, using racial or derogatory slurs, wearing or possession of items depicting or implying racial hatred or prejudice. District employees and students shall not at school, on school property or at school activities wear or have in their possession any written material, either printed or in their own handwriting, that is racially divisive or creates ill will or hatred. (Examples: clothing, articles, material, publications or any item that denotes Ku Klux Klan, Arayan [sic] Nation-White Supremacy, Black Power, Confederate flags or articles, Neo-Nazi or any other "hate" group. This list is not intended to be all inclusive.)

harassing or intimidating utterances ("name calling" and "using racial or derogatory slurs") as well as the display or even possession of racially offensive material. Such materials can be banned if they "depict[ ] or imply[ ] racial hatred or prejudice," if they are "racially divisive," or if they "create[ ] ill will or hatred."

Plaintiffs argue the unconstitutionality of the policy is directly mandated by *Saxe*, in which this court found overbroad a harassment policy plaintiffs maintain was "substantially identical" to the one at issue here. But we think the Warren Hills language is sufficiently different from[18] – and narrower than – the language found by *Saxe*

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[18] Two paragraphs of the *Saxe* harassment policy are pertinent here:

> Harassment means verbal or physical conduct based on one's actual or perceived race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics, and which has the purpose or effect of substantially interfering with a student's educational performance or creating an intimidating, hostile or offensive environment.
>
> . . . .
>
> Harassment can include any unwelcome verbal, written or physical conduct which offends, denigrates or belittles an individual because of any of the characteristics described above. Such conduct includes, but is not limited to, unsolicited derogatory remarks, jokes, demeaning comments or behaviors, slurs, mimicking, name calling, graffiti, innuendo, gestures, physical contact, stalking, threatening, bullying, extorting or the display or circulation of written material or pictures.

*Saxe*, 240 F.3d at 202-03.

*to be too broad that the policy requires independent evaluation.*[19]

Additionally, in *Saxe*, we noted the breadth of the policy's statement of purpose, which stated that "[m]embers of the school community are expected to treat each other with mutual respect" and that "[d]isrespect among members of the school community is unacceptable behavior." 240 F.3d at 217 n. 12. These statements made clear that much more was sought to be avoided than the kind of disruption that justifies speech regulation under *Tinker*.[20] Here, the history of racial hostility demonstrates

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[19] In *Saxe*, we focused on two portions of the disputed policy that do not have identical siblings in the Warren Hills policy. First, the *Saxe policy restricted conduct "which has the purpose or effect of substantially interfering with a student's educational performance." We noted that the "purpose" portion of that policy "ignores* Tinker's *requirement that a school must reasonably believe that speech will cause actual, material disruption before prohibiting it." 240 F.3d at 217. The Warren Hills policy contains no parallel language. Second, we found the language prohibiting speech that "creat[es] an intimidating, hostile or offensive environment" to encompass a substantial amount of protected speech, finding nothing in the policy requiring any level of severity or pervasiveness.* Id. *The language plaintiffs view as analogous here prohibits speech that causes "racial hatred or ill will." These concepts are similar, but it is not immediately apparent that the holding in* Saxe governs the language here.

Some of the language is, in fact, nearly identical. Both prohibit harassment "by name calling" and by using "racial . . . slurs." But this particular language was not analyzed in *Saxe*, and consequently was not the basis for our concluding the policy was overbroad.

[20] The defendant school board in *Saxe* has since adopted a modified version of the harassment policy. The new policy contains a narrower definition of harassment that includes references to disruption. The relevant portion of policy, as now published on the district's website, provides:

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the policy was intended to address a particular and concrete set of problems involving genuine disruption – not merely lack of mutual respect.

In any event, the policy here differs from *Saxe* not only in language, but also in the circumstances it addresses. The history of racial difficulties in Warren Hills provides a substantial basis for legitimately fearing disruption from the kind of speech prohibited by the policy. By contrast, in *Saxe, there was no evidence that the policy*

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> The term "harassment" as used in the Policy means verbal, written, graphic or physical conduct which does or is reasonably believed under the totality of the circumstances to
>
> 1. substantially or materially interfere with a student's or students' educational performance; and/or
>
> 2. deny any student or students the benefits or opportunities offered by the School District; and/or
>
> 3. substantially disrupt school operations or activities; and/or
>
> 4. contain lewd, vulgar or profane expression; and/or
>
> 5. create a hostile or abusive environment which is of such pervasiveness and severity that it materially and adversely alters the condition of a student's or students' educational environment, from both an objective viewpoint and the subjective viewpoint of the student at whom the harassment is directed.
>
> The term "harassment" for purposes of this Policy does not mean merely offensive expression, rudeness or discourtesy; nor does the term "harassment" mean the legitimate exercise of constitutional rights within the school setting. The School District recognizes there is a right to express opinion, ideas and beliefs so long as such expression is not lewd or profane or materially disruptive of school operations or the rights of others.
>
> http://www.scasd.k12.pa.us/policies/antiharassment.html (visited Aug. 7, 2002).

*was adopted in response to any particular events.*[21] *The lack of a similar history was at least partially responsible for our finding the harassment policy in Saxe* unconstitutional. We distinguished West because the school district there had "demonstrated a concrete threat of substantial disruption." 240 F.3d at 212. In the absence of such a history, the fear of disruption is likely to be no more than "undifferentiated fear or apprehension of disturbance." The school district in *Saxe "fail[ed] to provide any particularized reason as to why it anticipate[d] substantial disruption from the broad swath of student speech prohibited under the Policy." Id. at 217. By contrast, defendants here have presented substantial evidence of disruption that constitutes a solid foundation for fear of future disruption.*

Nonetheless, the language of the Warren Hills policy appears to cover speech that is not subject to lawful regulation under *Tinker*. Understood broadly, it seems likely there will be a good deal of speech that creates "ill will" that does not substantially interfere with the rights of other students or with the operation of the school as an educational institution. There may also be some harassment "by name calling" that does not genuinely threaten disruption. The question then is whether the policy can reasonably be interpreted to avoid this apparent constitutional problem.

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[21] In *Saxe*, the school district did not defend the policy on the basis of particular incidents that justified an increased expectation of disruption. It was legally challenged as facially unconstitutional shortly after its enactment by two students and their legal guardian who were concerned that the broad language would prevent them from expressing their religious views, especially their belief that homosexuality is sinful. *Saxe*, 240 F.3d at 203.

The District Court employed an interpretation that read a disruption requirement into the policy, requiring that the offensive material be "such that the school has a specific and well-founded fear that it will substantially disrupt or interfere with the work of the school or the rights of other students."[22] Defendants contend the court's interpretation is unreasonable insofar as it amounts to "rewrit[ing] [the policy] to conform it to constitutional requirements," *Am. Booksellers*, 484 U.S. at 397, 108 S.Ct. 636, by adding a requirement not found anywhere in the text of the policy.

We believe the District Court's reading goes beyond the scope of permissible interpretations of the policy. The text provides no support for the added requirement. Nowhere is disruption, or any like term, mentioned. Nor is there language in the policy suggesting that school officials should make an assessment of the kinds of disruptive effects that can justify speech regulation under *Tinker*.[23] As

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[22] The District Court read the policy as implying the following requirements:

> (1) wearing or possession of any written material
>
> (2) that is either
>
> (2a) racially divisive or
>
> (2b) creates racial ill will or
>
> (2c) creates racial hatred and that
>
> (3) is such that the school has a specific and well-founded fear that it will substantially disrupt or interfere with the work of the school or the rights of other students.

*Sypniewski*, No. 01-3061, at 56.

[23] Notably, the dress code, which the District Court found to exceed constitutional limits, does contain language from which such a requirement might arguably be drawn: "School officials may impose

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written, the policy proscribes "name calling," "racial prejudice," and "ill will," independent of any possible disruption. Without a more substantial textual anchor, the language cannot be stretched to include an independent disruption requirement without rewriting the policy. We did not consider this kind of modification in *Saxe*, nor do we know of any other court that has so modified a school speech policy.

We look then to the text of the racial harassment policy to determine whether the policy can be interpreted sufficiently narrowly that it does not ban speech protected under *Tinker*.[24] The policy begins, "District employees and

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limitations on student participation in the regular instructional program where there is evidence that inappropriate dress causes disruption in the classroom and the lack of cleanliness constitutes a health or safety hazard or disruption of the education program." The District Court did not assess the effect of this language, and we express no opinion on the constitutionality of this code.

[24] As noted, the challenged language was specifically upheld in the face of a facial attack by the Court of Appeals for the Tenth Circuit in *West*. The court there found the policy was sufficiently narrow because it:

> permits the administrator to consider whether the student's conduct was willful, whether the student displayed the symbol in some manner, and whether the conduct had the effect of creating ill will, and the district does not interpret the policy to prohibit the use or possession of such symbols for legitimate educational purposes.

206 F.3d at 1368.

Unlike the District Court's interpretation, nothing in *West* amounts to adding a requirement not supported in the policy's text. The issue, then, is not whether the interpretation is reasonable, but whether it is sufficiently narrow to avoid substantial overbreadth.

By themselves, the limitations in *West* do not appear to exclude all protected expression. Whether a student's conduct is willful does not

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student(s) shall not racially harass or intimidate other student(s) or employee(s) by name calling, using racial or derogatory slurs, wearing or possession of items depicting or implying racial hatred or prejudice." On its face, it appears the phrase "name calling" may be over broad. This category would seem to include much expression that is either relatively benign, or is protected political expression. But the entire sentence makes clear that what is prohibited is not (to take one of these categories) name calling in general, but *racial harassment or intimidation* by name calling. More benign forms of name calling are not included.

Intimidation of one student by another, including intimidation by name calling, is the kind of behavior school authorities are expected to control or prevent. There is no constitutional right to be a bully. On the other hand, confining prohibited speech to that which constitutes "harassment" is not alone sufficient to ensure constitutionality. In *Saxe*, we noted that "harassment," when targeted on the basis of its expressive content, encompasses speech within the area protected by the First Amendment. 240 F.3d at 209. We found the definition of

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necessarily alter its disruptive effects (although it may bear on the fairness of sanction). *Cf. Saxe*, 240 F.3d at 216 (finding overbreadth in policy that "punishes not only speech that actually causes disruption, but also speech that merely intends to do so"). And even when a symbol is actually displayed and actually causes ill will, it does not necessarily follow that substantial disruption will result. Consequently, these interpretive limitations do not provide a concrete basis for limiting application of the policy to fit within the range of proscribable speech delimited by *Tinker*. The question, then, is whether there are other bases for limiting the scope of the policy so that it fits within constitutional limits.

"harassment" employed there to be unconstitutionally broad, in large part because it encompassed expression not subject to regulation under *Tinker*. *Id.* at 216-17. Thus, in this case, a particular form of harassment or intimidation can be regulated by defendants only if it meets the requirements of *Tinker; that is, if the speech at issue gives rise to a well-founded fear of disruption or interference with the rights of others.*

In assessing the likelihood of disruption of racially provocative speech, the state of racial relations in the school is particularly relevant. "Racial harassment or intimidation by name calling" is more likely disruptive in the Warren Hills schools than elsewhere. Certain kinds of name calling – like racial slurs – will be especially likely to disrupt. The policy separately speaks of "using racial or derogatory slurs." So if "name calling" is to have any independent effect, something broader must be meant by "name calling" than "using racial or derogatory slurs." And it is less clear that a run-of-the-mill insult made to a person of a different race, for instance, will necessarily give rise to a genuine concern of disruption.

Although mere offense is not a justification for suppression of speech, schools are generally permitted to step in and protect students from abuse. Even where harassment by name calling does not involve a racial component, and even where there is no special history of disruption, prohibition accompanied by the threat of sanction is – and has always been – a standard school response. Students cannot hide behind the First Amendment to protect their "right" to abuse and intimidate other students at school. Outside the school context, of course, much harassment by name calling (understood broadly) is protected. But the First

Amendment does not interfere with basic school discipline. Consequently, in a racially charged environment, a school may prevent racially provocative harassment by name calling.[25]

More problematic is the phrase "creates ill will" in the second sentence of the policy, which reads, "District employees and students shall not at school, on school property or at school activities wear or have in their possession any written material, either printed or in their own handwriting, that is racially divisive or creates ill will or hatred." The focus of this phrase is entirely on the reaction of listeners. But by itself, an idea's generating ill will is not a sufficient basis for suppressing its expression. "The mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected." *R.A.V.*, 505 U.S. at 414, 112 S.Ct. 2538 (White, J., concurring); *see also Saxe*, 240 F.3d at 215 ("The Supreme Court has held time and again, both within and outside of the school context, that the mere fact that someone might take offense at the content of speech is not sufficient justification for prohibiting it."). What is required is that the school has a well-founded fear that the material at issue "would substantially disrupt or interfere with the work of the school or the rights of other students." *Id.* at 211. And disruption for purposes of *Tinker* must be more than "the discomfort and unpleasantness

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[25] It is worth emphasizing again that our discussion here is limited to the issue of overbreadth. It is enough for these purposes that the speech regulated by the policy is speech the school can regulate. Plaintiffs argue the policy, in focusing on racial speech, unconstitutionally picks out certain disfavored speech for special sanction. This issue is discussed in subsection III(c)(iii), *infra*.

that always accompany an unpopular viewpoint." *Tinker*, 393 U.S. at 509, 89 S.Ct. 733. As a general matter, protecting expression that gives rise to ill will – and nothing more – is at the core of the First Amendment.

It might be argued that "ill will" connotes something more than mere offense – a kind of hostility to the speaker that has a real likelihood of developing into conflict. Such an inference, however, would be fair only if "ill will" were construed so narrowly as to lose its ordinary sense. By contrast, such an argument would likely be more suitable with respect to racial "hatred." For "hatred" implies such strong feelings that a serious possibility of disruption might be inferred. But the inclusion of the stronger term "hatred" in the policy implies that the broader term "ill will" should be given its ordinary sense. And in its ordinary sense, no similar inference is reasonable. Accordingly, if "ill will" is to have any effect in the policy, it expands the policy too far into the domain of protected expression.

Another useful comparison is with the policy's prohibition on "racially divisive" materials. Racial divisiveness connotes something more than a listener's negative response to the expression. There is a notion of conflict implicit in the phrase. It suggests a mutual antagonism between competing individuals or groups of people that could erupt into genuine hostilities. And where a school has experienced a history of racial difficulties, it is more likely entitled to conclude that racially divisive material is a genuine threat to the proper maintenance of order and discipline.

Plaintiffs suggest the phrase "racially divisive" is itself too broad, because certain clearly protected expression, such as discussions of affirmative action, in or out of

the classroom, might be thought to be racially divisive. This may be so in some sense, but the racially divisive material must also be harassing or intimidating to be prohibited. For this reason, it is hard to view even a heated discussion of affirmative action as amounting to harassment or intimidation. In any event, we are confident the policy would not require the suppression of genuine political, social or academic discussions that reveal strongly held views on matters like affirmative action.

In short, given the state of racial relations in Warren Hills, defendants appear to have a genuine and well-founded basis for fearing disruption by most – but not all – of the expression prohibited by the policy. But one provision creates an overbreadth problem of sufficient magnitude that it must be stricken from the policy. That part of the policy directed at material that "creates ill will" is unconstitutional.

Stripped of this phrase, the remaining policy is constitutionally permissible in the context of the Warren Hills School District and its recent unpleasant history. This reliance on the background of turmoil at a particular place and a particular time means that the policy would likely be unconstitutional in another school district, or even in Warren Hills at a different time. Viewed one way, this is not troubling. Especially in the school setting, restrictive policies are appropriately targeted to the special features of the given context. What is necessary in one school at one time will not be necessary elsewhere and at other times. Schools require the flexibility to deal with problems as they arise. But the possibility that the policy may become unconstitutional is clearly an undesirable feature. A policy might avoid this problem by more directly

addressing the factors that justify the school's regulation of the speech. The District Court's approach would go a long way in achieving this result, but it might be addressed in any number of ways. Nonetheless, as modified, defendants have sufficiently established, at this juncture, a likelihood of establishing that the harassment policy's "restrictions are necessary to prevent substantial disruption or interference with the work of the school or the rights of other students." *Saxe*, 240 F.3d at 216. They may continue to enforce the policy so modified.

*ii. Vagueness.*

When the language of a regulation is vague, speakers are left to guess as to the contours of its proscriptions. They are left without "fair notice" of the regulation's reach. Commonly, this uncertainty will lead them to "steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." *Baggett v. Bullitt,* 377 U.S. 360, 372, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964) (citation omitted). The need for specificity is especially important where, as here, the regulation at issue is a "content-based regulation of speech. The vagueness of such a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech." *Reno v. ACLU,* 521 U.S. at 871-72, 117 S.Ct. 2329. There is also a second, "more important aspect of vagueness doctrine" *Kolender v. Lawson,* 461 U.S. 352, 358, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983). A vague rule "may authorize and even encourage arbitrary and discriminatory enforcement," *Morales*, 527 U.S. at 56, 119 S.Ct. 1849, by failing to "establish minimal guidelines to govern . . . enforcement." *Kolender,* 461 U.S. at 358, 103 S.Ct. 1855.

When addressing school disciplinary rules, courts have been less demanding of specificity than they have when assessing the constitutionality of other regulations, such as criminal statutes. As we have noted, because schools need the authority to control such a wide range of disruptive behavior, "school disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions." *Fraser*, 478 U.S. at 686, 106 S.Ct. 3159. Accordingly, school disciplinary rules will be struck down on this basis only when the vagueness is especially problematic.

The portions of the policy plaintiffs contend are unconstitutionally vague are imprecise. "Racially divisive" and "hatred and ill will" are phrases subject to a range of interpretations. But "there are limitations in the English language with respect to being both specific and manageably brief." *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers,* 413 U.S. 548, 578-79, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973). The challenged phrases are "set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest." *Id.* at 579, 93 S.Ct. 2880. The policy is not vague "in the sense that no standard of conduct is specified at all," but "in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard." *Coates v. City of Cincinnati,* 402 U.S. 611, 614, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971). Only the phrase "ill will" presents an arguable vagueness concern, but because we have found it to be constitutionally unsuitable for other reasons, we need not assess its precision for constitutionality. For public elementary and secondary school disciplinary rules, the language of the racial harassment policy is specific enough

to give fair notice to the students and to provide school officials with standards by which to enforce the policy.

*iii. Content Discrimination.*

Plaintiffs contend the policy is not only vague and overbroad, but is also, in a sense, too narrow. Because the policy restricts only speech that expresses racially oriented themes, plaintiffs contend the policy amounts to content discrimination.

"Content-based regulations are presumptively invalid." *R.A.V.*, 505 U.S. at 382, 112 S.Ct. 2538. This is true even where the regulation restricts only expression that can constitutionally be suppressed under the First Amendment. In *R.A.V.*, for example, the Supreme Court struck down a law that criminalized "bias-motivated" fighting words. Even though the speech at issue might have been regulated as fighting words, the Supreme Court held the law unconstitutional because it picked out only those fighting words that "arouse[ ] anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." *Id.* at 380, 112 S.Ct. 2538; St. Paul, Minn. Legis. Code § 292.02 (1990). The Court concluded that by limiting the applicability of the law to certain expression on the basis of its content, the city had engaged in "content discrimination." *R.A.V.*, 505 U.S. at 387, 112 S.Ct. 2538.

Plaintiffs contend that by targeting only racially provocative expression, Warren Hills has singled out for sanction a particular class of speech based on its content. While the school district has the right to sanction speech that is disruptive, plaintiffs contend that under *R.A.V.*, it is not permitted to discriminate between disruptive speech

that has racial elements and disruptive speech that does not.

The racial harassment policy is indisputably a content-based restriction on expression, and in other contexts, may well be found unconstitutional under *R.A.V.* But as discussed, the public school setting is fundamentally different from other contexts, including the university setting.[26] Primary and secondary school officials stand in a unique relationship with respect to their students, most of whom are minors. They are charged with the basic education of the nation's youth, which is "perhaps the most important function of state and local governments." *Brown v. Bd. of Ed.,* 347 U.S. 483, 493, 74 S.Ct. 686, 98 L.Ed. 873 (1954). This task requires not simply enforcement, but "shaping the students' experience to achieve educational goals," *Ambach v. Norwick,* 441 U.S. 68, 78, 99 S.Ct. 1589, 60 L.Ed.2d 49 (1979), which include "inculcating fundamental values necessary to the maintenance of a democratic political system." *Id.* at 77, 99 S.Ct. 1589. Further, "the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges." *Hazelwood,* 484 U.S. at 273, 108 S.Ct. 562. A crucial element of that responsibility is maintaining an environment conducive to fulfilling the state's educational mission. Accordingly, "conduct by the student, in class or out of it, which for any

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[26] Compare *Dambrot,* 55 F.3d at 1184, where the Court of Appeals for the Sixth Circuit applied *R.A.V.* in finding unconstitutional a public university's harassment policy. "Under *R.A.V., the . . . policy constitutes content discrimination because it necessarily requires the university to assess the racial or ethnic content of the speech.*"

reason – whether it stems from time, place, or type of behavior – materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech." *Tinker*, 393 U.S. at 513, 89 S.Ct. 733. And importantly, school officials are granted "comprehensive authority . . . to prescribe and control conduct in the schools." *Id.* at 507, 89 S.Ct. 733. Courts have long recognized the need to grant schools a degree of flexibility in identifying conduct that disrupts education or violates principles central to their mission. For this reason, courts have recognized a similar need for flexibility in adopting responses to those perceived problems.

When due respect is paid to the needs of school authority, it becomes clear the focus on racial expression in this case is justifiable. When a school has identified a class of speech that, because of its content, is subject to a well-founded fear of conflict, it should be allowed to prescribe clear rules that students are capable of following to the degree necessary to maintain order. The "comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools" requires the ability to implement rules of conduct viewed by school officials as capable of adequately guiding the behavior of students and administrators. *Tinker*, 393 U.S. at 507, 89 S.Ct. 733.

We believe that *Tinker* and its progeny provide the principal mode of analysis in this area. It is not entirely clear what implications *R.A.V.*'s "underbreadth" analysis

has for public school disciplinary policies.[27] In any event, we need not resolve this question because it is clear that adopting a policy limited to racially provocative speech was an acceptable non-discriminatory response by school authorities to the history of race relations in Warren Hills schools. Therefore, while a similar policy may be found unconstitutional on this basis in other contexts, the policy does not amount to "content discrimination" in violation of the First Amendment within the context of these public schools.

## IV.

We recognize the challenges faced by school officials when attempting to adopt disciplinary policies directed at racial harassment. The need to respect the rights of students requires a careful balancing. On the one hand, speech codes are disfavored for their tendency to interfere with or silence protected speech. Students should not be prevented from engaging in nondisruptive speech. But when there is a concrete basis – ordinarily established by a history of disruption and interference with the legitimate rights of other students – for concluding that certain expression presents a well-founded fear of disruption, a

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[27] There might be instances in which *R.A.V.* would require finding unconstitutional a school policy in a case governed by *Tinker*. Presumably, a school cannot distinguish between subclasses of disruptive speech on any basis it chooses. Where such a distinction is made on no legitimate basis at all, it might be possible to conclude the subcategory of disruptive speech had been singled out simply because the school officials disfavored the views expressed. *Cf. Saxe*, 240 F.3d at 206-10 (discussing *R.A.V. in school disciplinary context, but not holding policy unconstitutional on that basis).*

school should be free to address the issue by adopting a formal policy, so long as the policy narrowly targets the identified problems. When policies focus broadly on listeners' reactions, without providing a basis for limiting application to disruptive expression, they are likely to cover a substantial amount of protected speech. Here, the inclusion of the phrase "creates ill will" causes just such a problem.

Defendants have made a good faith effort to respond to a serious disciplinary problem without unduly restricting students' expression. Nevertheless, the application of the policy to the Foxworthy T-shirt appears to go too far. Defendants have not, on this record, established that the shirt might genuinely threaten disruption or, indeed, that it violated any of the particular provisions of the harassment policy (excepting, perhaps, the "ill will" provision).

Accordingly, we will reverse the District Court to the extent it refused to enjoin further application of the racial harassment policy to the Foxworthy T-shirt, and to the extent it permitted further enforcement of the policy's "ill will" provision.

ROSENN, Circuit Judge, concurring and dissenting.

I concur and join in Parts I, II, and subsections (2) and (3) of Part III of the well-drafted majority opinion. However, I do not agree that any part of the Warren Hills School Board's (WHSB or Board) policy to combat racial harassment in its elementary and public schools was impermissible or unconstitutional. I therefore respectfully dissent from the majority's decision that the District Court abused its discretion in denying a preliminary injunction, particularly on a record comprised of affidavits and not

testimony, that sought to enjoin enforcement of the School Board's anti-racial harassment policy.

I.

WHSB adopted its anti-racial harassment policy "in response to a pattern of disturbing racial incidents." (Maj. op. at 246) The first racial incident occurred in October 1999 at the high school when a white student dressed for Halloween appeared at the school wearing overall jeans, a straw hat, and a thick rope around his neck. The student had tied the rope in a noose and blackened his face. The majority describes the growing pattern of incidents at the high school during the year 2000-2001, the many students "deeply offended" by the racial incidents, and the new student recently enrolled at the high school who was physically threatened at his home by a large group of teenagers. I, therefore, will not repeat them. "The District Court also found the racial tension spilled over into the classroom, displacing class lessons with discussions about racial relations." (Maj. op. at 247)

The Warren Hills High School (WHHS) consists of approximately 1200 students from grades seven to twelve. Fewer than sixty of those are African-American. An indication of the depth to which racial harassment had descended at the high school by the time the WHHS adopted its anti-harassment policy is a series of actions by students and the School District to achieve relief. In May 2000, Hester German, a high school sophomore, filed a complaint with the Warren County Human Relations Commission alleging racial harassment. Her complaint noted concerns about students wearing T-shirts with the

Confederate flag, some of which also had the word "Redneck." As a result, the School District initiated a program to promote the value of diversity and assured the Human Relations Commission that it would monitor the situation carefully. By the beginning of the school year, 2000-2001, the severity of racial relations had escalated. Students not only wore Confederate flags on their T-shirts but gang-like behavior commenced with racially-fired hate groups known as "Hicks" appearing at the high school.

In October 2000, the Warren County Human Relations Commission submitted a letter to the School Board in support of the Board's efforts to deal with racial bias on an individual basis. On October 20, 2000, as the majority observes, the School District's Mediation Coordinator, Timothy Downs, issued an internal report concerning the racial strife at the high school during the preceding month. The report stated: "At this time, this issue is too complex, involves too many people, and is too controversial for Peer Mediation Services." (Maj. op. at 248-49) With racial harassment escalating, a fight occurred between a black student and a white student that resulted in a concussion and stitches for one of the students. (Maj. op. at 248)

Racial harassment at the high school continued unabated between October 2000 and February 2001. The Board increasingly became concerned for the safety of the minority population at the high school. Having exhausted its resources at independent intervention, the Board and its school superintendent, Merluzzi, concluded that the "minority population was at significant risk from, not only verbal and intimidating harassment, but also . . . physical violence." The Board thereupon researched anti-harassment policies around the country and ultimately

selected a policy that it concluded best fit the situation at hand – a policy that had been upheld by the Court of Appeals for the Tenth Circuit. Shockingly, within days after the adoption of the policy, sexually and racially obscene graffiti were found in the boys' and girls' restrooms, too vulgar to repeat.

The anti-racial harassment policy adopted on March 13, 2001, by the School Board provides in pertinent part:

Racial Harassment or Intimidation

District employees and student(s) shall not racially harass or intimidate other student(s) or employee(s) by name calling, using racial or derogatory slurs, wearing or possession of items depicting or implying racial hatred or prejudice. District employees and students shall not at school, on school property or at school activities wear or have in their possession any written material, either printed or in their own handwriting, that is racially divisive or creates ill will or hatred. (Examples: clothing, articles, material, publications or any item that denotes Ku Klux Klan, Arayan [sic] Nation – White Supremacy, Black Power, Confederate flags, or articles, Neo-Nazi or any other "hate" group. This list is not intended to be all inclusive.)

The policy plainly is directed at student misbehavior. It is a code of conduct admonishing students and begins with an opening statement not to "racially harass or intimidate other student(s) or employee(s) by name calling, using racial or derogatory slurs, wearing or possession of items depicting or implying racial hatred or prejudice." The balance of the operative paragraph amplifies the opening statement directing employees and students while

at school not to wear or possess "any written material . . . that is racially divisive or creates ill will or hatred." This statement is followed by examples such as items denoting the Ku Klux Klan, White Supremacy, Black Power, Confederate flags, neo-Nazi or any other hate groups. It is essentially a policy obviously designed to curb student racial misbehavior, prejudice and hatred and to encourage civility and respect for the rights of other students. Nothing in it prohibits or discourages protected freedom of expression. The policy complements the mission of the school to prepare pupils for citizenship, and to promote human values and a peaceful society. It is not a speech code "disfavored for[its] tendency to interfere with or silence protected speech." (Maj. op. at 268)

II.

The plaintiffs, one in the Middle School and the other in high school, assert a First Amendment right to wear a T-shirt with the word "Redneck" printed on it. Relying on *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969) and our recent decision in *Saxe v. State Coll. Area Sch. Dist.,* 240 F.3d 200 (3d Cir.2001), they argue that wearing the T-shirt is protected speech and that applying the policy to ban wearing it violates their First Amendment rights. In *Tinker*, the court declared that neither students nor teachers "shed their constitutional rights to freedom of speech or expression at the school-house gate." *Id.* at 506, 89 S.Ct. 733. However, the right of freedom of expression is not absolute. The Court recognized the right of a student to express opinions with the proviso that 'he does so without 'materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation

of the school,' and without colliding with the rights of others." 393 U.S. at 503, 89 S.Ct. 733 (quoting *Burnside v. Byars,* 363 F.2d 744, 749 (5th Cir.1966)).

In his concurrence, Mr. Justice White deemed it appropriate to note that "the Court continues to recognize a distinction between communicating by words and communicating by acts or conduct which sufficiently impinges on some valid state interest." *Id.* at 515, 89 S.Ct. 733. In the instant case, the plaintiffs raise First Amendment rights to communication by conduct, not oral speech. In his concurrence, Mr. Justice Stewart stated that he could not share the majority's assumption "that, school discipline aside, the First Amendment rights of children are coextensive with those of adults." *Id.* at 515, 89 S.Ct. 733.

The facts in *Tinker* differ from what we have here. In *Tinker, the students wore black armbands to express a political point of view – publicizing their objections "to the hostilities in Vietnam and their support for a truce." Id. at 504, 89 S.Ct. 733. In the instant case, it is difficult to find much expression in the T-shirt, although the plaintiffs claim that the expression is one "about being a 'Redneck sports fan,'" not much of an expression of an idea. However, the school authorities saw in it an inflammatory identification with the Hicks and racial harassment.*

In *Tinker*, the Supreme Court noted that the wearing of the armbands "in the circumstances of this case was entirely divorced from actually or potentially disruptive conduct by those participating in it. It was closely akin to 'pure speech.'" *Id.* at 505, 89 S.Ct. 733. The Court distinguished between a situation involving "pure speech" and one involving aggressive, disruptive action or even group demonstrations. There was no evidence whatever in

*Tinker of any interference "with the schools' work or of collision with the rights of other students to be secure and to be let alone." Id. at 508. By contrast, in the instant case, we have evidence of widespread racial harassment of students, disruption of school teaching, violence, interference with the rights of other students, and the subjection of male and female students to sexual and racial obscenities. The effect on many students was offensive, distressing, and profound. As Superintendent Merluzzi and the Board concluded, "there had been significant disruption in the school and . . . the population was at significant risk from not only verbal and intimidating harassment but also, increasingly, the risk of physical violence."*

The plaintiffs argue that a restriction on free expression does not "pass constitutional muster" unless the school can "point to a well-founded expectation of disruption – especially one based on past incidents arising out of similar speech." *Cf. Saxe*, 240 F.3d at 211. They assert that because there have never been any racial incidents relating to the T-shirt or the word "redneck," the decision to ban T-shirts is not based on a "specific and significant fear of disruption." This argument lacks merit. First, as Judge Scirica observed at oral argument, plaintiffs' position represents an "almost impossible standard to satisfy." Second, the School Board can point to evidence of disruption, or to a well-founded expectation of disruption or interference with the rights of other students. In *Tinker*, the court not only spoke of the school's fear of disruption but added another important dimension. The Court also expressed concern over whether the challenged conduct "would substantially interfere with the work of the school or impinge upon the rights of other students." 393 U.S. at

509, 89 S.Ct. 733. These are conditions and concerns that also weighted heavily on the WHSB.

Under such circumstances as confronted the WHSB, the Supreme Court has held that officials are not entirely helpless. Even under less disruptive and racially harassing circumstances than the WHSB confronted, the Court has recognized the highly appropriate function of public school education "to prohibit the use of vulgar and offensive terms in public discourse." *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986). The Court upheld in that case a disciplinary rule proscribing "obscene" language and sanctions for a lewd speech by a high school student. Here, we have obscenities and much more. The Court in *Fraser* emphasized the importance of public education to prepare pupils for citizenship and the "fundamental values of habits and manners of civility essential to a democratic society [that tolerates] divergent political and religious views, [but which] also take into account consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students." *Id.* at 681, 106 S.Ct. 3159.

The *Fraser* Court also echoes *New Jersey v. T.L.O.*, 469 U.S. 325, 340-342, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985), holding that "the constitutional rights of students in public schools are not automatically coextensive with the rights of adults in other settings." *Id.* at 682, 106 S.Ct. 3159. It does not follow that because an offensive form of expression may not be prohibited for adults under certain circumstances that "the same latitude must be permitted to children in a public school." *Fraser*, 478 U.S. at 682, 106 S.Ct. 3159.

In *Hazelwood Sch. Dist. v. Kuhlmeier,* the Supreme Court concluded that the standard articulated in *Tinker* for determining when a school may punish student expression need not also be the standard governing a school's refusal to lend its name and resources to the dissemination of school expression. Instead, the Court held that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." 484 U.S. 260, 273, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988) (footnote omitted). The Court also observed, of pertinence here, that the education of the Nation's youth is primarily the task "of parents, teachers, and state and local school officials, and not of federal judges." *Id.* The Court made the point that only when the decision to censor a vehicle of student expression has no valid educational purpose is the First Amendment so directly and sharply implicated as to require judicial intervention to protect students' constitutional rights. Here, the T-shirt had no valid educational purpose and the School Board's policy had a legitimate pedagogical concern.

The plaintiffs contend, however, and the majority apparently agrees, that their "Redneck Sports Fan" T-shirt did not "materially and substantially interfere" with the school's work or the rights of other students. Confronted with an acute, critical problem of racial harassment, intimidation, and violence as was the WHHS, the decision whether the wearing of the shirt "materially and substantially interfered" with the school's work and the rights of other students was best determined by the school authorities. The school authorities were on the firing line; they

were in a position to feel the heat of the fray, perceive the tensions and intimidation, and see the effect on school classes. Federal judges, especially in this case where no witnesses have testified, have only a cold, lifeless record.

Yet, even on this record, there is substantial evidence in the affidavits from which to determine that the "Redneck" T-shirt materially and substantially interfered with the school's work and the rights of other students. The racial harassment at the school commenced with T-shirts. Offensive Confederate flags were indisputably emblazoned on the shirts. Before the adoption of the policy, Tom **Sypniewski**, the older of the three brothers and initially a plaintiff, had been observed in the high school with the Confederate flag displayed on the back of his shirt. Immediately after the policy was instituted, he wore the "Redneck" T-shirt to school. The school newspaper reported that he wore the shirt "because it is associated with the words 'redneck' and 'hick,'" a term by which he and his friends refer to themselves.

Tom previously had been photographed in the Newark Star Ledger wearing a shirt that stated "not only am I perfect, but I'm a redneck too," with a Confederate flag illustrated on the word "redneck." He also had been observed pre-policy wearing a shirt with the Confederate flag displayed. There had been a two-year pattern of disruption and interference with classes and students before the adoption of the harassment policy, focused in the early stages on the use of the Confederate flag by a

group known as the "Hicks."[28] Many students believed that the Hicks were also known as the Rednecks.[29] The perception of the school newspaper when Tom was photographed wearing the T-shirt immediately after the adoption of the anti-harassment policy that the Rednecks and the Hicks were associated together was also a perception of the school authorities.

Plaintiffs also assert that "redneck" is not pejorative and, therefore, the policy should not have been applied to it; they claim it is an innocuous synonym for "hick." This argument is unavailing. Although they acknowledge that the District Court used *Webster's Third New International Dictionary* to determine that "redneck" is defined as a "white member of the Southern rural laboring class," they ignore the most salient portion of the District Court's definition: that the term "redneck" is "usually used disparagingly." "Redneck" and "hick," though similar terms, had become identified at the high school with some form of racial and divisive animus. The District Court recognized that the words "while certainly not identical, are quite similar, particularly given the overall school context." (Dist. Ct. op. at A-68) The District Court further found similarities "between the Confederate flag and the term

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[28] The plaintiffs argue that the school newspaper was wrong and that Tom was not a member of the Hicks. Whether Tom was or was not a member of the Hicks is irrelevant. Relevancy lies in how the students and the paper perceived Tom, and they were under the impression that Tom wore the shirt because of his association with the Hicks.

[29] Superintendent Merluzzi averred, *inter alia*, "that [m]any of the students at the high school who are familiar with the group that calls themselves the 'hicks' are also of the opinion that this ... racially intolerant group also called themselves the 'rednecks.'"

'redneck' as well indicated, for instance, by German's complaint about a shirt with both the words 'redneck' and a Confederate flag."

Superintendent Merluzzi and Assistant Principal Griffith, in determining how the "redneck" T-shirt was or would be perceived by the student body on the heels of the disruptive effect of the Confederate flag on student T-shirts, had a "well founded expectation of disruption" and interference with the rights of the other students. The "defendants here have presented substantial evidence of disruption that constitutes a solid foundation for fear of future disruption." (Maj. op. at 262-63) In addition, there is substantial evidence that wearing T-shirts, whether depicting the Confederate flag or "redneck," were symbols of racial intolerance and divisiveness to the students and faculty that substantially interfered with school operations and invaded the rights of other students. *Tinker* spoke not only in terms of disruption of school activities but in the disjunctive, interference with the rights of others.

Finally, the appellants assert that the policy has been discriminatorily applied because Tom was disciplined for wearing the T-shirt and Brian was not. This argument also fails. First, the Board has recognized that "in hindsight action should have been taken" against Brian, too. Moreover, although the policy is district-wide, there is no reason that the policy must have the same breadth in the middle school that it has in the high school. The high school has been the major racial battleground; indeed, neither party has made this Court aware of any racial incidents occurring in the middle school. What is likely to have a disruptive effect in one environment is not necessarily likely to have the same effect in another. The School Board reasonably concluded that due to the two-year cycle

of racial harassment the T-shirt posed a threat of disruption and interference with the rights of other students in the high school that was not present in the middle school. The School Board did not apply the antiracial harassment policy unconstitutionally.

III.

The plaintiffs also assert that the policy is facially unconstitutional in its entirety. I agree with the majority that striking down a statute or a school regulation because it is overbroad on its face is "strong medicine." As the Court stated in *New York v. Ferber,* 458 U.S. 747, 769, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982), facial unconstitutionality is employed "with hesitation, and then only as a last resort." This is particularly true in an elementary and high school environment where "the overbreadth doctrine warrants a more hesitant application . . . than in other contexts." (Maj. op. at 258-59) The reasons are obvious and well stated by the majority. It notes that here, "the history of racial hostility demonstrates the policy was intended to address a particular and concrete set of problems involving genuine disruption." (Maj. op. at 261-62) Nonetheless, the majority holds that the anti-racial policy "directed at material that 'creates ill will' is unconstitutional." (Maj. op. at 265)

The policy is entitled "Racial Harassment or Intimidation," and the introductory sentence focuses on conduct depicting hatred or prejudice. As to the second sentence in which the phrase "creates ill will" appears, it is conjoined with school activities and materials that are "racially divisive or create[ ] ill will or hatred." Thus, the ill will phrase is limited to students and employees of the WHSD

"at school, on school property or at school activities." As to the students at this school, it appears plain that they are not to wear or possess items at school that will create ill will, and thus aggravate the racial harassment at the school.

The Court of Appeals for the Tenth Circuit, in construing these precise words in a similar school policy challenged by a student as overbroad, held that the policy "does not threaten protected speech and is not unconstitutionally overbroad." *West v. Derby Unified Sch. Dist. No. 260*, 206 F.3d 1358, 1368 (10th Cir.2000). The Merriam Webster Collegiate Dictionary, 9th ed. (1990) defines "ill will" and "malice" as synonymous. The term "malice" has been in use in legal jurisprudence for centuries and is well defined in both criminal and civil law. Black's Law Dictionary, 7th ed. (1999) also defines it in a nonlegal context as "ill will; wickedness of heart." This court defined the term "malice" in *Lippay v. Christos,* 996 F.2d 1490 (3d Cir.1993) which involved a malicious prosecution claim, as "ill will in the sense of spite . . . or its use for an extraneous improper purpose." *Id.* at 1502. The term "malice" appears frequently in the case law, and like "ill will," has a well developed legal meaning. Malice generally means that harm is inflicted intentionally and without justification or excuse. *See, e.g., Ideal Dairy Farms v. John Labatt, Ltd.,* 90 F.3d 737, 747 (3d Cir.1996). Therefore, as used in the anti-racial policy here, conduct that creates ill will or malice has a well defined meaning. It is not overbroad, especially in a high school setting where the school authorities are not drafting a statute but only a policy for students.

Running through each of these definitions is an element of enmity, spite, or improper purpose – "wickedness at heart." Moreover, in this case we deal not with

pure speech but student conduct. I therefore disagree with the majority's statement that "[a]s a general matter, protecting expression that gives rise to ill will – and nothing more – is at the core of the First Amendment." (Maj. op. at 264-65) There is more here, much more, in light of the decisions referred to above and the definition of ill will. Conduct in a public school differs from pure speech in a public forum or a legislative body, especially at a time when a school is suffering from high tension, disruption, and interference with the rights of other children. At the core of a definition of "ill will" is "something more than mere offense" described by the majority. Here, we have "ill will" in the form of misconduct in a school ambience indisputably disrupted with racial divisiveness. Under such circumstances, "a serious possibility . . . might be inferred" of inciting more disruption or prolonging the disruption already present.

For these reasons, the majority's conclusion that the words ill will "expands the policy too far into the domain of protected expression" is not well founded. Even though in an adult public forum or in the public press, speech spoken with malice is unprotected, *see New York Times v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), the majority gives words of enmity and wickedness at heart in a children's ambience an unjustifiable sense of propriety. It does this at a time when the Nation's public schools are struggling for survival. Such protective construction of words, I fear, to children attending elementary and public schools may only encourage them to defy their teachers, discourage school teachers, and threaten to undermine a school system already under strong attack. The schools of this Nation undoubtedly have contributed to giving us tranquility and to making us a more law-abiding people.

Uncontrolled and uncontrollable liberty is an enemy to domestic peace.

We cannot close our eyes to the fact that some of the country's greatest problems are crimes committed by the youth, too many of school age. School discipline, like parental discipline, is an integral and important part of training our children to be good citizens – to be better citizens.

*Tinker*, 393 U.S. at 524, 89 S.Ct. 733 (Black, J., dissenting).

IV.

In conclusion, it must be noted that pending before us is the denial by the District Court of a request for a preliminary injunction. The court's decision was based on a record consisting of affidavits only, without any witness having been subjected to cross-examination. The District Court emphasized the preliminary nature of the proceedings and of its order. The denial of a preliminary injunction is committed to the sound discretion of the district judge. The scope of appellate review is narrow. Unless the trial court abused its discretion, or committed an obvious error in applying the law, we must take the judgment of the trial court as presumptively correct. *Campbell Soup Co. v. ConAgra, Inc.*, 977 F.2d 86, 91 (3d Cir.1992); *Kershner v. Mazurkiewicz*, 670 F.2d 440, 443 (3d Cir.1982) (en banc).

Under these circumstances, we should be quite deferential to the District Court's order and affirm. Indeed, "the most compelling reason in favor of [granting a preliminary injunction] is the need to prevent the judicial process from

being rendered futile by defendant's action or refusal to act." 11A *Wright & Miller, Federal Practice and Procedure* § 2947 (1995). There should be no concern here that the judicial process will be rendered futile through the District Court's denying injunctive relief. The case will proceed to trial and the children in the meantime should behave by conforming to the school's policy until the District Court will have acted on the application for a permanent injunction.

Moreover, "[a]s a prerequisite to the issuance of an interlocutory injunction. . . . [t]here must be no disputed issues of fact." *Charles Simkin & Sons, Inc. v. Massiah,* 289 F.2d 26, 29 (3d Cir.1961). Here, there are many disputed facts, militating against injunctive relief. Finally, an injunction should issue "only if the movant produces evidence sufficient to convince the trial judge that all four factors favor preliminary relief." *Opticians Ass'n of America v. Indep. Opticians of America,* 920 F.2d 187, 192 (3d Cir.1990). The plaintiffs simply have not met that burden, as the District Court found that several factors militate against injunctive relief. Because I do not believe the District Court erred in denying injunctive relief and that the school policy is unconstitutional as applied or facially overbroad, I respectfully dissent.

**NOT FOR PUBLICATION**

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

| | |
|---|---|
| THOMAS SYPNIEWSKI, JR., et al., | CIVIL ACTION NO. 01-3061 (MLC) |
| Plaintiffs, | **MEMORANDUM OPINION** |
| v. | |
| WARREN HILLS REGIONAL BOARD OF EDUCATION, et al., | (Filed Sep. 4, 2001) |
| Defendants. | |

***COOPER, District Judge***

This matter comes before the Court on the motion of plaintiffs Matthew Sypniewski and Brian Sypniewski for a preliminary injunction enjoining the defendant school officials from enforcing certain portions of the school district's dress code and racial harassment policy and taking any disciplinary action against plaintiffs if they wear to school a T-shirt with the message "Top 10 Reasons you might be a Redneck Sports Fan if . . . " The Court has considered the papers submitted by the parties and heard oral argument on August 15, 2001. The parties have waived any evidentiary hearing on this matter before the Court, and we will therefore decide this matter on the submissions before us. The Court hereby issues its findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52.

For the reasons stated in this opinion, we conclude preliminarily that the challenged portion of the racial harassment policy is a valid restriction on student speech and that it may be enforced during this litigation

to prohibit expression which includes the T-shirt in question. We further conclude that the challenged portion of the dress code may not satisfy constitutional standards and should therefore not be enforced prospectively during the pendency of this litigation against the wearing of clothing which violates the racial harassment policy.

## BACKGROUND

This action was commenced when plaintiffs Thomas Sypniewski, Jr. ("Thomas"), Brian Sypniewski ("Brian"), and Matthew Sypniewski ("Matthew") filed their Complaint on June 25, 2001. (Compl., no. 1-1 on the docket.) Before his graduation on June 15, 2001, Thomas was a student at Warren Hills Regional High School ("High School"). (*See, e.g.*, Aff. of Thomas Sypniewski, Jr., filed 6-25-01 ("Thomas Sypniewski Aff.") ¶ .) Brian was a student at the Warren Hills Regional Middle School ("Middle School") and is entering the High School in September of 2001. (*See, e.g.*, Aff. of Brian Sypniewski filed 6-25-01 ("Brian Sypniewski Aff.") ¶ 1.) Matthew is a student at the High School and the Warren County Technical School and is scheduled to graduate from the High School in June of 2004. (*See, e.g.*, Aff. of Matthew Sypniewski filed 6-25-01 ("Matthew Sypniewski Aff.") ¶ 1.) Defendants in this action are: (1) the Warren Hills Regional Board of Education ("Board of Education" or "Board"), (2) Peter Merluzzi ("Merluzzi"), Superintendent of the Board of Education; (3) Beth Godett ("Godett"), Principal of the High School; (4) Ronald Griffith ("Griffith") and Philip Chalupa ("Chalupa"), Vice Principals of the High School, and (5), the members of the Board of Education, Elizabeth Ames, Marcy

Matlosz, Ray Busch, Suyling Heurich, James T. Momary, Nancy Fallen, William Miller, Bradley Breslin, and the Rev. Scott Schantzenbach.[1] (*See, e.g.*, Compl. ¶¶ 8-12.)

The Board of Education has adopted two policies: (1) a provision in the Student Handbook governing restricted clothing ("Dress Code") and (2) a policy regarding racial harassment or intimidation ("Racial Harassment Policy" or "the Policy"). The Dress Code provides:

> Students also have the responsibility to dress appropriately and to keep themselves, their clothes, and their hair clean. School officials may impose limitations on student participation in the regular instructional program where there is evidence that inappropriate dress causes disruption in the classroom and the lack of cleanliness constitutes a health or safety hazard or disruption of the education program. The following is considered inappropriate for school:
>
> a) Clothing displaying or imprinted with nudity, vulgarity, obscenity, profanity, double entendre pictures or slogans (including those related to alcohol, drugs, and tobacco), or portraying racial, ethnic, or religious stereotyping.
>
> b) Flip-flops, thongs, and other hazardous footwear.

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[1] The administrators are named in both their individual and official capacities while the members of the Board of Education are sued in their official capacities only. (Compl. ¶¶ 8-12.)

c) Clothing which has been intentionally torn, cut, or ripped in a fashion which displays the anatomy.

d) Spandex garments without additional outer clothing.

e) Any clothing deemed gang-related, including the way the clothing is worn.

f) Gym-type apparel, clothing intended as undergarments worn as outer garments, or see-through garments without appropriate undergarments.

g) Street coats, windbreakers, and head coverings worn in the building. These items should be placed in lockers immediately upon arrival.

Exceptions for medical or religious reasons must be referred to the principal.

h) Bare midriff clothing.

(Compl. Ex. A: Dress Code.) The Policy states in relevant part:

> District employees and student(s) shall not racially harass or intimate other student(s) or employee(s) by name calling, using racial or derogatory slurs, wearing or possession of items depicting or implying racial hatred or prejudice. District employees and students shall not at school, on school property or at school activities wear or have in their possession any written material, either printed or in their own handwriting, that is racially divisive or creates ill will or hatred. (Examples: clothing, articles, material, publications or any items that denotes [sic] Ku Klux Klan, Arayan [sic]

> Nation – White Supremacy, Black Power, Confederate flags or articles, Neo-Nazi or any other "hate" group. This list is not intended to be all inclusive.)
>
> As part of the instructional process, professional staff may display and discuss divisive materials and/or symbols when selected and used to enhance knowledge, provided these topics are included in the approved Warren Hills Regional Schools curriculum. Said materials must be removed from display daily.

(Compl. Ex. B: Racial Harassment or Intimidation Policy.) The Dress Code is and was in effect at all times relevant to this motion. The Racial Harassment Policy was implemented on March 13, 2001. (Certif. of Peter Merluzzi filed 8-7-01 ("Merluzzi Certif.") ¶ 27.)

## I. Events at the High School Prior to Suspension of Thomas

According to Merluzzi, the Warren Hills School District ("School District") educates 2,000 students from grades seven to twelve. (Merluzzi Certif. ¶ 2.) Of these students, approximately five percent are members of minority groups, with 50 African American students. (*Id.*) Merluzzi certifies that minority students "have been the subject of intimidation and severe harassment by a portion of the student body over the last 2 years." (*Id.*) Similarly, Griffith certifies that he has "witnessed the [High School] transform from a peaceful setting into a virtual racial battleground within the course of the past approximately two years," with incidents of racial intolerance that are not only disruptive but unbearable for many students. (Certif. of Ronald Griffith filed 8-7-01 ("Griffith Certif.") ¶ 13.) This

pattern led to the implementation of the Racial Harassment Policy on March 13, 2001, and the Board of Education's heightened scrutiny of student conduct. (Merluzzi Certif. ¶ 2.)

In October of 1999, a white student came to school on a Halloween "costume day" with a "black face," farmer overall jeans, a straw hat, the name "Toby" on his chest, and a thick rope around his neck tied in a noose. (*Id.* ¶ 4.) Griffith was called to remove this student from the cafeteria because of fear of potential racial tensions. (*Id.*) The student in question was taken to Griffith's office and informed that such an outfit was both inappropriate and offensive. (*Id.*). The student told Griffith that African American students had painted their faces white and that, because this conduct did not bother anyone, he believed his use of "black face" was also not inappropriate. (*Id.*) Griffith notified the police, and a detective photographed the student and commenced investigations. (*Id.*) The student's mother was also informed of his clothing, and she picked him up at the school (*Id.*) The student was suspended because of his attire. (*Id.*)

Hester German ("German"), then a sophomore at the High School, submitted a racial harassment complaint with the Warren County Human Relations Commission ("Human Relations Commission") in the earlier half of 2000. (*Id.* ¶ 5 & Ex. A: Minutes of 4-3-00, Warren County Human Relations Commission ("4-3-00 Commission Minutes") at 2.) According to Merluzzi and the minutes of the Human Relations Commission meeting held on April 3, 2001, German found T-shirts worn by fellow students bearing the Confederate flag to be offensive. (Merluzzi Certif. ¶ 5; 4-3-00 Commission Minutes

at 2.) Merluzzi states that "[s]ome of the aforementioned shirts in [sic] which offended this student in addition to displaying the [C]onfederate flag also contained the word, "Redneck" on them." (Merluzzi Certif. ¶ 5.) German also complained of other conduct she considered offensive, as well as a lack of concern on the part of school officials. (*id.*; 4-3-00 Commission Minutes at 2.) In response, the Human Relations Commission made a number of suggestions. (4-3-00 Commission Minutes at 2.)

At the request of the Washington Township police chief James McDonald, Merluzzi attended the Human Relations Commission meeting on or about June 5, 2000. (Merluzzi Certif. ¶¶ 6-7.) Merluzzi certifies that he told the Human Relations Commission that, "at that time, . . . the wearing of the [C]onfederate flag was a form of expression which could not be infringed upon unless it was in a context which causally connected the flag with the racial bias." (*Id.*) He informed the Human Relations Commission that no occurrences were directly related to the students wearing Confederate flag shirts and "the incidents did not appear to be coordinated." (*Id.*) Merluzzi also stated that, because of German's complaint, a program had been created at the High School to promote diversity and peer mediation and peer leadership programs had been instituted. (*Id.*) Merluzzi assured the Human Relations Commission that the racial situation would be closely monitored, the School District was committed to a safe and harassment-free environment, and, if future racial incidents were to occur, he would recommend that the School Board take action and consider policy and disciplinary changes. (*Id.*)

At the commencement of the 2000-2001 school year September of 2000, students continued to wear Confederate flag T-shirts. (*Id.* ¶ 8.) Thomas admits that, while he did not consider this flag to be a racist symbol, he wore shirts bearing its image to school, without hearing any objection. (Reply Aff. of Thomas Sypniewski, Jr., filed 8-15-01 ("Thomas Sypniewski Reply Aff.") ¶ 10.) According to both Merluzzi and Griffith, a student group was formed that called themselves the "Hicks" or the "Rednecks." (Merluzzi Certif. ¶¶ 8, 49; *see also* Griffith Certif. ¶¶ 8-12.) Related incidents occurring on September 20, 2000 led school officials to learn of the existence of this group and its activities. (Merluzzi Certif. ¶ 13; Griffith Certif. ¶¶ 8-9.) According to Merluzzi, with the formation of this group and its "gang like behavior," previously "separate and uncoordinated acts . . . began to have a focus and the conduct became coordinated." (Merluzzi Certif. ¶ 8.)

In September of 2000, some students began to wear Confederate flag T-shirts every Wednesday. (Merluzzi Certif. ¶ 9.) At approximately 7:30 a.m. on Wednesday, September 20, 2000, a student walked down the High School's hallway waving a Confederate flag. (Griffith Certif. ¶ 5; Merluzzi Certif. ¶ 10 & Ex. W: Police Investigation Report dated 9-20-00 ("9-20-00 Police Investigation Report at 27.[2]) Griffith informed this student that

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[2] Exhibit W to Merluzzi's certification contains a large number of photocopied documents and other papers. The Court will cite these documents according to the page number written in by Defendants for the entire exhibit.

Although many of these documents relate to incidents specifically described by Merluzzi and Griffith, a number concern occurrences not

(Continued on following page)

his behavior was inappropriate and confiscated the flag. (Griffith Certif. ¶ 5; Merluzzi Certif. ¶ 10.) The student was not disciplined, at least at that time. (Griffith Certif. ¶ 5.)

On the same day, Timothy Downs ("Downs"), supervisor of the High School's peer leadership and mediation programs, informed Griffith that some students were concerned about this Confederate flag-waving incident. (*Id.* ¶ 6.) Griffith also learned that students were disseminating racially offensive materials and jokes they had downloaded from the Internet and telling these jokes in the classroom. (*Id.* ¶¶ 6, 9; Merluzzi Certif. ¶ 12 & Ex. W: 9-20-00 Materials ("9-20-00 Materials") at 28-33.) Merluzzi claims that "the impact of these actions on the academic program was profound as this issue [of race] was the predominant one in the [H]igh [S]chool." (Merluzzi Certif. ¶ 12.) The individual sent to Griffith as responsible for telling these offensive jokes was the same student who had been carrying the Confederate flag earlier in the day. (Griffith Certif. ¶ 7.) In fact, this student, after the confiscation of his flag, brought out another Confederate flag and continued to wave it while walking down the hallway. (Merluzzi Certif. ¶ 11; Griffith Certif. ¶ 8.) From this student, Griffith learned that, in Griffith's words, "there is a group who identify themselves as the '[H]icks' and wear [C]onfederate flags on their clothing on a day that they refer to as 'White Power Wednesday to show white power.'" (Griffith Certif.

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otherwise addressed in this motion. Given the large number of occurrences discussed by Merluzzi and Griffith, it is unnecessary for this Court to describe these additional incidents.

¶ 8; *see also* Merluzzi Certif. ¶ 13.) The student specifically informed Griffith, "Today is White Power Wednesday," the reason for bringing the Confederate flags and racially offensive jokes to the High School. (Griffith Certif. ¶ 8; *see also* Merluzzi Certif. ¶ 13.) ("It became evident at this time that the [C]onfederate flag was being used as a symbol by these students and that it was inextricably intertwined with the blatant racism of this group as evidence[d] by the racially offensive materials utilized by them.") Griffith suspended this student for his behavior, particularly the possession and reading of the offensive material. (Griffith Certif ¶ 8; Merluzzi Certif. ¶ 11.)

Griffith then spoke with another student, who was likewise involved in the events of September 20, 2000 (*Id.* ¶ 9.) This second student downloaded the racially offensive materials from a website he called "Whitesonly.com" (*Id.*) This student also confirmed the existence of the group known as the "Hicks" and referred to "White Power Wednesday." (*Id.*) According to Griffith, "[i]t has been clear since that time that the 'Hicks' are at the center of the racial problems in the school." (*Id.* ¶ 9; *see also* Merluzzi Certif. ¶ 13.)

Griffith continued his investigations regarding the events on September 20, 2000, and the school administration remained concerned about the overall state of racial tensions at the High School.[3] (Griffith Certif.

[3] The following day, September 21, 2000, a meeting was held between Griffith and several students, including Thomas. (Griffith Certif. ¶ 12; Thomas Sypniewski Reply Aff. ¶ 3.) According to Griffith, these students "who associate with and refer to themselves as the group

(Continued on following page)

known as the '[H]icks'," wanted to discuss the events of September 20, 2000 as a group, expressed their anger concerning the confiscation of the Confederate flag and the racially offensive materials, and "refused to understand or respect the impact which their conduct had on the minority students at our school." (Griffith Certif. ¶ 12.) This description of the meeting is part of various items of evidence offered to demonstrate that Thomas was a member of the group known as the "Hicks" or the "Rednecks" and was involved in various racial incidents. (*See, e.g.*, Merluzzi Certif. ¶¶ 17 ("Despite pressure from many sources to take action the Board wanted to afford the involved individuals, including Tom Sypniewski, the opportunity to resolve the issues themselves."), 43, 50 & Ex. R: Student Newspaper Editorial dated 10-00 ("[Thomas] simply wears [the Confederate flag] because it is associated with the words 'red-neck' and 'hick' (a term by which he and his friends refer to themselves.)")

Thomas, however, denies that he is a member of any group known as the "Hicks" or "Rednecks" and states that, while he has referred to himself as a "redneck," he has understood this term to mean a "non-sophisticated person who likes to work and play in the outdoors." (Thomas Sypniewski Reply Aff. ¶ 2; *see also* Thomas Sypniewski Aff. ¶ 8.) He further claims that he has been called a hick or a farmer and that he understands these two terms to be synonymous. (Thomas Sypniewski Reply Aff. ¶ 2.) He expressly states that he believes none of these terms are racist because he is not a racist. (*Id.*) He also states that "I was not involved in any of the various allegedly racist incidents described in defendants' papers, and defendants do not even assert that I was." (*Id.*).

Thomas presents a different recollection of the meeting with Griffith on September 21, 2000. (Thomas Sypniewski Aff. ¶¶ 2-3.) Thomas claims that he went to this meeting to discuss the subject of "Carhart Clothing jeans." (*Id.* ¶ 3.) He states that he heard from another student that Griffith, in response to the Confederate flag incident, was planning to ban the jeans, which Thomas wears. (*Id.*) Thomas states that he merely asked whether these jeans were going to be prohibited, and did not express any objection regarding the Confederate flag confiscation and the opposition to offensive jokes. (*Id.*) According to Thomas, Griffith gave an equivocal response to his question regarding the jeans, but, the next school day, Griffith announced that the rumor concerning these jeans was no longer an issue. (*Id.*)

(Continued on following page)

¶ 10.) Griffith began gathering statements from students either associated with the "Hicks" or who witnessed the events on September 20, 2000. (*Id.*; *see also* Merluzzi Certif. Ex. W: Student Statements Related to 9-20-00 Incidents ("Student Statements Related to 9-20-00 Incidents") at 34-47.) Griffith certifies that these statements provided a more complete picture of what was going on at the High School. (Griffith Certif. ¶¶ 10-11.) In particular, certain students felt angry and hurt because of the Confederate flag incident on September 20, 2000. (*See, e.g.*, Student Statements Related to 9-20-00 Incidents at 40 ("When she told me [about the Confederate flag incident,] I felt angry and hurt and offended."), 42 ("I get so angry it gets to the point where I cry . . . "), 43 ("My personal response to seeing my fellow students carrying around a Confederate flag was a response of offense."), 45 (noting feelings of hurt and frustration), 46 ("I'm not [African American] but I still get offended when things like [the Confederate flag incident] happen to my friends"), 47 (The symbol/flag to me just means hate and just makes me somewhat belittled almost to be [sic] point of crying. . . . "); *see also* Griffith Certif. ¶ 11.) At least one student felt like resorting to violence in response. (Student Statements Relating to 9-20-00 Incidents at 40-42; *see also* Griffith Certif. ¶ 11 (finding sense of desperation and vulnerability especially troubling and noting that, based on past well-known incidents, such an environment cannot be

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The Court need not resolve any factual dispute regarding these matters because, given the overall pattern of behavior identified by Defendants as well as the legal analysis applicable to this motion, such factual disputes are not particularly relevant or dispositive.

allowed to exist without "running the risk of catastrophe").) None of these student statements specifically mentioned Thomas or the term "redneck" (Student Statements Referring to 9-20-00 Incidents), even though one student listed the students believed to be members of the "Hicks." (*id.* at 37.)

"White Power Wednesdays" apparently continued to occur, with students wearing T-shirts decorated with the Confederate flag, meeting in the student parking lot before the start of the school day, and "exhibiting other gang[-]like behavior [aimed] at the minority student population in [the High School]." (Merluzzi Certif. ¶ 9.) This practice became a topic of dissension and often arose during classes, disrupting studies. (*Id.* ¶ 9.) Graffiti was found in the boy's bathroom stating "Keep the flag raised" on or about September 27, 2000. (Merluzzi Certif. ¶ 14 & Ex. B: Violence, Vandalism, and Substance Abuse Incident Report Form dated 9-27-00.) The conduct was coordinated and the pattern of behavior was consistent, even though the symbols changed during the year. (Merluzzi Certif. ¶ 9)

The racial tensions at the school were discussed at a regularly scheduled meeting of the Board of Education held on October 3, 2000. Several parents as well as students expressed their views, including those in favor of permitting students to continue to wear Confederate flag clothing. (Merluzzi Certif. ¶ 15.) Thomas and his parents, Thomas Sypniewski, Sr., and Nancy Sypniewski, were present at this meeting. (*Id.* ¶ 16; Thomas Sypniewski Reply Aff. ¶ 4; Aff. of Nancy Sypniewski filed 8-15-01 ("Nancy Sypniewski Aff.") ¶ 1.) Statements were made by Thomas Sypniewski, Sr., Nancy Sypniewski,

Merluzzi, and James Broscious, counsel for the School District and counsel in this matter.

As the newspaper article concerning this meeting states, Thomas's father told the Board of Education that:

> Racism . . . is dark, ugly, like a mold that will grow on you if you allow it. It divides towns, countries, nation, and schools. . . . It's like a wall. . . . A week ago, two kids touched this wall, and I want to thank you people for acting the way you should have. As we go on, if any child regardless of color, touches that wall of racism, he should be suspended or whatever has to be done should be done. . . . But the feedback that we got was that you were going to ban [Confederate flag] tee-shirts. Two states in this nation – Alabama and Georgia – have the confederate flag. . . . If you ban the tee-shirts, that means you have to ban the two state flags. Basically, two kids did something wrong, and you guys are brave enough to go ahead and discipline them. We expect you to. No "White Wednesdays" or "Black Fridays." But don't throw the baby out with the bath water. Don't ban the flag. My son wore the Confederate flag. We're no racists. Please, don't get sucked up with the sharks. Do what you have to, but when you start banning state flags, things are going to snowball. Deal only with the problem at hand, with each individual act individually.

(Thomas Sypniewski Reply Aff. Ex. A: Susyn Mihalasky, *No Race Problem at High School, Parents Told*, Star-Gazette, Oct. 12, 2000 ("10-12-00 Article") (alteration in original); *see also* Thomas Sypniewski Reply Aff. ¶ 4

(quoting initial part of newspaper article quotation); Nancy Sypniewski Aff. ¶ 3 (stating that her husband said real problem is within one's heart).) Nancy Sypniewski stated at the meeting that she believed the boys who paraded through the hallways with a Confederate flag and made racist jokes were wrong and that her sons agreed with her opinion, but that it was wrong to group students together and punish every student because of the actions of a few. (Nancy Sypniewski Aff. ¶ 2; *see also* Thomas Sypniewski Reply Aff. ¶ 4; 10-12-00 Article ("A ban would be taking the actions of two students and turning them onto the whole student body. . . . If you ban one thing, you have to right down the line and ban them all, including Malcolm X tee-shirts.")

Merluzzi made a number of statements at the October 3 Board of Education meeting, reported in the newspaper account of the meeting. Among his statements, he described the racial problems that had occurred and referred to the need to balance free speech rights with the right to safety, security, and a harassment-free school environment. (Merluzzi Aff. ¶ 16.) He said:

> We don't have a race problem; we've never had a race problem. There were only two individuals who had problems. The mass of students get along with one another.

(10-12-00 Article; *see also* Thomas Sypniewski Reply Aff. ¶ 5.) Merluzzi further stated that students had behaved in an admirable manner. (10-12-00 Article at A-1; *see also* Thomas Sypniewski Reply Aff. ¶ 5.) He also stated his view that the issue is not the Confederate flag T-shirts, which he claimed students have the right to

wear, symbols, or whether a person was offended, and the real issue involves the actions that accompany the T-shirts or symbols, which possibly implicate Defendants' affirmative action policies. (10-12-00 Article at A-1; *see also* Thomas Sypniewski Reply Aff. ¶ 5.) Merluzzi told the students and parents that, while no new policy was needed to deal with these problems, the students involved must end their behavior (Merluzzi Certif. ¶ 16.) Broscious made similar comments by stating that speech and demonstrations of feeling are protected as long as they do not involve action and a ban of the Confederate flag was not being considered. (10-12-00 Article at A-1; *see also* Thomas Sypniewski Reply Aff. ¶ 5.)

The meeting did not result in the board of Education adopting any new formal policy because the consensus of the Board of Education and Merluzzi was that the students ought to be given an opportunity to reform their behavior before any formal action was taken. (Merluzzi Certif. ¶ 16.) Merluzzi in particular believed at the time that "the problem could be dealt with on an individual basis and . . . that our school had a wide variety of diversity programs as well [as] peer mediation which . . . would adequately remedy the racial problem." (Merluzzi Certif. ¶ 45.) The Board of Education, however, did decide to review its options. (*Id.* ¶ 16.)

Even before the October 3 meeting, the problems at the High School and the appropriate correctional actions to be taken became a topic of community discussion, including editorials and a letter to the local newspaper. (*Id.* ¶ 17 & Ex. C: Letter to Editor from Heather Gerard ("Gerard Letter"), Editorial dated 9-28-00 ("9-28-00 Editorial"), Editorial dated 9-27-00 ("9-27-00 Editorial").) The Board of Education, even with pressure for action, still

wanted to provide the involved individuals the opportunity to end their behavior and resolve these difficulties themselves. (Merluzzi Certif. ¶ 17.)

The Human Relations Commission wrote a letter dated October 31, 2000 expressing its support for the Board of Education's course of action, noting that continuing efforts are required to reduce the chance of future occurrences of bias, and offering its support to both the Board of Education and the school administration. (*Id.* ¶ 18 & Ex. D: Letter from Bruce Hays, Chairperson to Mrs. Ames dated 10-31-00 ("10-31-00 Human Relations Commission Letter") at 1-2.) Often with the assistance of the Human Relations Commission, there have been programs, assemblies, and guest speakers at the High School, and the peer mediation and peer leadership programs have been utilized in an attempt to resolve these problems. (Merluzzi Certif. ¶¶ 44-45.)

Downs presented an internal report on October 20, 2000 concerning racial problems, particularly such matters as the display of the Confederate flag and the conduct of the "Hicks." (*Id.* ¶ 46 & Ex. T: Incident Report submitted by Timothy Downs dated 10-20-00 ("10-20-00 Downs Report") at 2.) The report contained a number of conclusions (Merzulli Certif. ¶ 46), including that the display of the Confederate flag in the non-teaching area threatened and offended several students, and recommendations, such as that the wearing or displaying of the Confederate flag for non-instructional purposes ought to be banned. (10-20-00 Downs Report at 3-4.) He stated that he believed the Dress code's provision regarding racial, ethnic, or religious stereotyping may already ban such a display. (10-20-00 Downs Report at 4.) Downs concluded that a group called the "Hicks" does exist with the goal of promoting racial

intolerance and that the racial problems exceed the capacities for ordinary peer mediation. (Merzulli Certif. ¶ 47; 10-20-00 Downs Report at 3-4.)

An incident occurred off school grounds involving a white student who had just entered the High School on December 1, 2000. (Merluzzi Certif. ¶ 19 & Ex. E: Statement of Parent ("Parent's Statement").)[4] This student was friendly with his minority peers, particularly several African American students, eating regularly with his friends and expressing acceptance of African American students by socializing with them. (Merluzzi Certif. ¶ 19.) This student was accosted at his house by approximately forty teenagers in their vehicles. (Merluzzi Certif. ¶ 20; Parent's Statement.) These teenagers threatened the student by shouting racial obscenities such as "nigger lover" and "nigger lover, bitch" as well as threats of physical violence. (Merluzzi Certif. ¶ 20 & Parent's Statement.) The teenagers also treated the student's father with disrespect, verbally abusing him and failing to leave when commanded. (Merluzzi Certif. ¶ 20 & Parent's Statement.) The police were contacted and a report was filed. (Merluzzi Certif. ¶ 21.) The student's father also came to the High School to report this incident at his home and the school administration questioned the father to obtain further details. (*Id.*) Some individuals named as involved in this

[4] The Court is uncertain as to when this incident occurred because Merluzzi certifies it happened during October of 2000 (Merluzzi Certif. ¶ 19), while the parent's statement indicates December 1, 2000 (Parent's Statement). The court will follow the date given on the parent's statement.

incident had also been connected with the Confederate flag "and harassment issues in September and October." (*Id.*)

One of the students who identified himself as a member of the Hicks arrived at school with a Confederate flag, having dimensions of approximately four feet by six feet, over the back of his truck in the student parking lot on or about December 4, 2000. (Merluzzi Certif. ¶ 22 & Ex. F: Mem. from Ron Griffith to Mr. Pete Merluzzi dated 12-4-00 ("12-4-00 Mem.") at 2.) This student was asked to remove the Confederate flag, but, because he was leaving to attend a work study program, he removed both this flag and his truck at the same time. (Merluzzi Certif. ¶ 22; 12-4-00 Mem. at 1.) According to Merluzzi, this incident provided even further evidence to the Board of Education that racial harassment persisted at the High School even though the Board of Education was attempting to eliminate it without resorting to formal action. (Merluzzi Certif. ¶ 22.)

Between October of 2000 and February ~~of 2001,~~ students continued to wear clothing decorated with the Confederate flag and continued the "racially harassing behavior." (*Id.* ¶ 23.) The Board of Education therefore became even more concerned about the safety of minority students, and it came to realize that its attempts to stop this behavior through warnings and the disciplining of individual students were unsuccessful. (*Id.*) Both the Board of Education and Merluzzi believed that they must explore the possible adoption and implementation of a formal policy "banning this type of behavior in the school." (*Id.* ¶ 24.) In the words of Merluzzi, "[i]t was the consensus of the Board of Education and myself that there had been significant disruption in the school and that the minority population was at significant risk from, not only verbal

and intimidating harassment but also, increasingly, the risk of physical violence." (*Id.*) The Board of Education's decision to act was also motivated not only by concern for the minority students, but the interfering effect of the harassment on studies and the entire student body. (*Id.*)

The Board of Education researched racial harassment policies from other school districts. (*Id.* ¶ 25.) It selected a policy, based on the particular types of behavior found to be disruptive and harassing in school. (*Id.*) This chosen policy had actually withstood legal challenges in *West v. Derby Unified School District No. 260,* 206 F.3d 1358 (10th Cir. 2000). (*Id.* ¶¶ 25-26.) The Board of Education tried to balance student rights with the behavior that had occurred up to this point in adopting this new policy. (*Id.*) Specifically, Merluzzi believed that, by basing the new policy on the regulation sustained in *West*, "we could accomplish the goal of protecting the minority population, running a safe and harmonious school and at the same time also protect the rights of all of the students." (*Id.* ¶ 25)

The Board of Education's chosen policy was given its first reading at a February 20, 2001 meeting of the board of Education. (*Id.* ¶ 27.) A second reading was given on March 6, 2001, and the Racial Harassment Policy was then officially adopted. (*Id.*) No individual attending either meeting voiced opposition to the Policy. (*Id.*) In fact, even though the issue was covered in the media, no public opposition occurred to the Racial Harassment Policy's implementation. (*Id.*) Merluzzi notified the community by letter on March 9, 2001. (*Id.*) The Policy was then implemented on March 13, 2001. (*Id.*) Students were permitted to wear Confederate flag shirts from the first reading until March 13, 2001 (*Id.* ¶ 28), and several students did so,

including Thomas on February 22, 2001 (*id.* ¶¶ 28, 51 & Ex. V: Warren Hills Resource Staff Incident Report dated 2-22-01 ("2-22-01 Incident Report").) Other "racially harassing behaviors" also continued during this time before the final implementation of the Racial Harassment Policy. (*Id.* ¶ 28.)

## III. The Foxworthy T-Shirt

Brian purchased three T-shirts at Wal-Mart in or about September of 1999, one for himself and the other two for Thomas and Matthew. (Brian Sypniewski Aff. ¶ 2; Thomas Sypniewski Aff. ¶ 2; Matthew Sypniewski Aff. ¶ 2.) The Sypniewskis' T-shirt was based on the routine of the comedian Jeff Foxworthy ("Foxworthy") and said:

> Top 10 Reasons you might be a Redneck Sports Fan if . . .
>
> 10. You've ever been shirtless at a freezing football game.
>
> 9. Your carpet used to be part of a football field.
>
> 8. Your basketball hoop used to be a fishing net.
>
> 7. There's a roll of duct tape in your golf bag.
>
> 6. You know the Hooter's menu by heart.
>
> 5. Your mama is banned from the front row at wrestling matches.
>
> 4. Your bowling team has it's own fight song.
>
> 3. You think that "Bud Bowl" is real.
>
> 2. You wear a baseball cap to bed.

> 1. You've ever told your bookie "I was just kidding."

("Foxworthy T-shirt") (Thomas Sypniewski Aff. ¶ 2; *see also* Brian Sypniewski Aff. ¶ 2; Matthew Sypniewski Aff. ¶ 2.)[5] All three brothers deny that they believed the Foxworthy T-shirt "portrayed any racial, ethnic, or religious stereotyping, that it was racially divisive, or that it created ill will." (Thomas Sypniewski Aff. ¶ 3; Brian Sypniewski Aff. ¶ 3; Matthew Sypniewski Aff. ¶ 3.) Thomas believed that the term "redneck" refers, not to a "violent, bigoted person," but "a person who listens to country music, enjoys hunting and other outdoor activities, and has a big heart." (Thomas Sypniewski Aff. ¶ 8; *see also* Thomas Sypniewski Reply Aff. ¶ 2.) He states that, while Foxworthy used this term in his records and appearances, he was never attacked as representing himself as a violent bigot. (Thomas Sypniewski Reply Aff. ¶ 8) Thomas also believed Wal-Mart would not sell a bigoted T-shirt. (*Id.*) All three brothers state that, if the Foxworthy T-shirt were bigoted, they would not have worn and, in the case of Brian, bought the Foxworthy T-shirt, because it would then be contrary to their beliefs. (Thomas Sypniewski Aff. ¶ 3; Brian Sypniewski Aff. ¶ 3; Matthew Sypniewski Aff. ¶ 3.) All three students were aware of the Dress Code and its restrictions. (Thomas Sypniewski Aff. ¶ 4; Brian Sypniewski Aff. ¶ 4; Matthew Sypniewski Aff. ¶ 4.)

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[5] The Court notes that the numbering of this list differs in the three brothers' affidavits. The Court follows the numbering given in Thomas's affidavit.

Thomas wore the Foxworthy T-shirt to the High School during the 1999-2000 and 2000-2001 school years on several occasions; Matthew wore the Foxworthy T-shirt to both the High School and the Technical School during the 2000-2001 school year; and Brian wore this Foxworthy T-shirt to the Middle School during the 2000-2001 school year. (Thomas Sypniewski Aff. ¶ 4; Brian Sypniewski Aff. ¶ 4; Matthew Sypniewski Aff. ¶ 4.) No administrator or student ever objected to the Foxworthy T-shirt. (Thomas Sypniewski Aff. ¶ 4; Brian Sypniewski Aff. ¶ 4; Matthew Sypniewski Aff. ¶ 4.)

Thomas wore the Foxworthy T-shirt to the High School on March 22, 2001. (Thomas Sypniewski Aff. ¶ 5.) No one commented about his Foxworthy T-shirt until the last period. (*Id.*) A security guard, Neil Corley ("Corley"), then told Thomas that he had to report to Griffith's office.[6]

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[6] Some dispute exists as to what Thomas told Corley at this time. According to Griffith and Merluzzi, Thomas said to Corley that he had been waiting all day for someone to notice. (Griffith Certif. ¶ 18; Merluzzi Certif. ¶ 51; *see also* Compl. Ex. C: Report of Neil Corley ("I shook my head and Tommy said something to the effect 'I've been waiting all day for someone to notice.").) According to Merluzzi, "[t]his statement revealed [Thomas's] true intentions for wearing the shirt on this particular day." (Merluzzi Certif. ¶ 51.) Similarly, Griffith certifies that the alleged statement "signaled to me that [Thomas wore it] for motivations that were not consistent with our educational mission." (Griffith Certif. ¶ 18.) Similarly, Griffith refers to a newspaper article regarding the incident in which Thomas is quoted as saying "the thought crossed my mind that this is going to piss people off." (*Id.* & Ex. A: Bill Bray, *Student Won't Leave 'Redneck' Fight Alone,* Express-Times, at B-2.) Defendants emphasize that, in a newspaper article from October 4, 2000, Thomas was depicted wearing a T-shirt with the word "Redneck" embroidered with the Confederate flag. (Merluzzi Certif. ¶ 51 & Ex. U: Susan Todd, *District Waits to Ban Shirts with Rebel Flag,*

(Continued on following page)

Star-Ledger, Oct 4, 2000 at 31; Griffith Certif. ¶ 18.) Griffith and Merluzzi therefore conclude that Thomas associated the term "redneck" with the banned Confederate flag and related conduct. (Griffith Certif. ¶ 18; Merluzzi Certif. ¶ 51.) Merluzzi also emphasizes that "[Thomas's] association with the ["Hicks"] was evident during the course of the 2000-2001 school year, and that, on February 22, 2001, he was seen wearing a Confederate Flag shirt with other students associated with the "Hicks" or the "Rednecks." (Merluzzi Certif. ¶ 51; 2-22-01 Incident Report.) Merluzzi further states that, in addition to these statements and the newspaper picture, Thomas's intent was demonstrated by "his association with the group known as the 'Hicks' or 'rednecks.'" (Merluzzi Certif. ¶ 50.)

The Board of Education, in its denial letter of Thomas's appeal as well as its press release, also emphasized Thomas "intended his shirt to convey a message" because of his statement that "I have been waiting all day for someone to notice." (Compl. Ex. F: Letter from Peter Merluzzi to Mr. & Mrs. Thomas Sypniewski dated 4-20-01 ("Appeal Denial") at 1 & Ex. G: Press Release ("Press Release") at 2.) The Board of Education found the disciplining appropriate given the climate and background as well as that "the statement by the student indicating he was intending to be noticed corroborates the fact that he was attempting to portray a message of racial stereotyping." (Appeal Denial at 2. Press Release at 2.)

Plaintiffs present a quite different account of the matters raised by Defendants above. According to Thomas, he said to Corley, "This is the last period of the day. I've been walking around all day and now you've noticed. (Thomas Sypniewski Aff. ¶ 6.) He specifically denies ever making the statement attributed to him in the newspaper account of the March 22, 2001 incident. (Thomas Sypniewski Reply Aff. ¶ 7.) He avers that he told the reporter that, when he was dressing in the morning of March 22, 2001, he hoped that the Foxworthy T-shirt would not "tick anyone off" but believed that, because he had worn the shirt many times before and no problem had arisen, there was no reason to refrain from wearing it. (*Id.*) He then states that Merluzzi had informed him that students possessed a right to wear even a shirt with a Confederate flag. (*Id.*) Because he did not believe Foxworthy or the use of the term "redneck" in his routine was considered racist or offensive, he determined there was no reason why he should not wear the Foxworthy T-shirt to school. (*Id.*) He emphasizes that he never intended to convey a message of racial stereotyping. (Thomas Sypniewski Aff.

(Continued on following page)

(*Id.*) Thomas complied and went to Griffith's office. (Thomas Sypniewski Aff. ¶ 6.) Griffith, according to his certification, "recognized the shirt as a symbol which had the potential to incite violence in our school because of the racial tension present at this time." (Griffith Certif. ¶ 14.) He was alarmed because the term "redneck was being used in an offensive manner in our school and, given the current situation, that it was being used to harass our minority students." (*Id.*) He found the term, given the circumstances at the High School, not only offensive but also a means of self-identification of the group known as the "Hicks" or the "Rednecks." (*Id.; see also, e.g.,* Merluzzi Certif. ¶ 49 at 17.[7]) Therefore, according to Griffith, "Hick or Redneck became synonymous with racial harassment" (*Id.*; *see also, e.g.,* Merluzzi Certif. ¶ 49 at 17.) He also noticed the terms "budbowl" and "Hooters" on the Foxworthy T-shirt, which he states constitute express violations of the Dress Code as a reference to alcohol and sexual innuendo. (Griffith Certif. ¶¶ 15, 20; *see also* Merluzzi Certif. ¶ 52.) Griffith, however, found these alcoholic and sexual references of lesser importance than the "redneck" reference "because of the troubling history of racial tension at our school and the possibility that the term 'redneck' would incite some form of violence and at a

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¶ 14.) Thomas also admits to having worn Confederate flag T-shirts, but he notes he never considered them to be racist in nature, no one ever objected, and he was permitted to do so at the time. (Thomas Reply Aff. ¶ 10.) He avers that he has never worn a confederate flag T-shirt since the Racial Harassment Policy's ban. (*Id.*)

[7] The Court notes that Merluzzi's certification contains multiple paragraphs numbered as "48" and "49." When citing these paragraphs, the Court gives the page number as well.

minimum be offensive and harassing to our minority population." (Griffith Certif. ¶ 15.) Merluzzi supported Griffith, finding, for instance, "that the shirt was offensive at this time of great racial tension in the school, [and] the term 'redneck' and 'hick' were not appropriate on display on t-shirts because of their representation to certain racially intolerant groups present in the [High School]." (Merluzzi Certif. ¶ 48 at 16.)

Griffith told Thomas that he found the Foxworthy T-shirt to be offensive and a violation of the Dress Code, without mentioning the Racial Harassment Policy. (Thomas Sypniewski Aff. ¶ 7.) He told Thomas that the term "redneck" is slang for a "violent, bigoted person." (*Id.*) Griffith ordered Thomas to turn the Foxworthy T-shirt inside-out or change into a different shirt under penalty of suspension. (*Id.* ¶ 9; Griffith Certif. ¶ 16.) Thomas responded that he did not believe the Foxworthy T-shirt was offensive or violated the Dress Code or the Policy. (Sypniewski Certif. ¶ 10.) He said he would appeal any suspension. (*Id.*) Griffith, with a disciplinary report, suspended Thomas for three days. (*Id.*; Griffith Certif. ¶ 16; Compl. Ex. D: Discipline Report dated 3-22-01 ("3-22-01 Discipline Report"); *see also* Merluzzi Certif. ¶ 48 & Ex. W: Police Investigation Report dated 3-22-01 at 48.) Thomas was disciplined for insubordination based on his violation of the Dress Code, with the disciplinary report citing the provision of the Dress Code concerning clothing with racial, ethnic, or religious stereotyping. (3-22-01 Discipline Report; Griffith Certif. ¶ 16; Thomas Sypniewski Aff. ¶ 10.)

Merluzzi and Griffith state that they used the Dress Code as the basis for the discipline due to a belief that full implementation of the Racial Harassment Policy ought to

be "eased into" because the Dress Code's penalty was less severe than the sanction called for by the Policy and students ought to be given a chance to reform their behavior. (Merluzzi Certif. ¶ 49; Griffith Certif. ¶ 17.) A report dated March 22, 2001, apparently by Griffith, provides further details of this meeting, including that Thomas was shown a dictionary definition of the term "redneck" as well as a *USA Today* article referring to a case regarding the banning of a Marilyn Manson shirt. (Nancy Sypniewski Aff. Ex. B: Report dated 3-22-01.) Both Merluzzi and Griffith, however, clearly believed that the Foxworthy T-shirt violated the Racial Harassment Policy as well. (Merluzzi Certif. ¶ 49; Griffith Certif. ¶ 17.)

Before Thomas appealed his suspension to the Board of Education, an incident regarding his brother Brian and the Foxworthy T-shirt occurred on March 23, 2001. (Brian Sypniewski Aff. ¶ 5.) Brian wore the Foxworthy T-shirt to the Middle School on that day, aware that the Middle School was operating under the new Racial Harassment Policy. (*Id.*) The Vice Principal of the Middle School, Robert Griffin ("Griffin"), informed Thomas that he had spoken with Merluzzi and they "had concluded that the T-shirt was not offensive and did not violate the Dress Code." (*Id.*) No disciplinary action therefore was initiated against Brian. (*Id.*)

Thomas submitted an appeal of his suspension on March 26, 2001. (Thomas Sypniewski Aff. ¶ 12; Compl. Ex. E: Appeal dated 3-25-01 ("Thomas Sypniewski Appeal").) The Board of Education upheld the three-day suspension and denied this appeal by a letter dated April 20, 2001. (Thomas Sypniewski Aff. ¶ 13; Compl. Ex. F: Letter from Peter Merluzzi to Mr. & Mrs. Thomas Sypniewski dated 4-20-01

("Appeal Denial") at 1.) The Board of Education specifically stated that the discipline was based on a failure to follow the Dress Code and insubordination. (*Id.*) It quoted the provision of the Dress Code dealing with clothing exhibiting racial, ethnic, or religious stereotyping. (*Id.*) In a likely reference to the lack of discipline of Brian for wearing the Foxworthy T-shirt at the Middle School on March 23, 2001, the Board concluded:

> The student in question points out that another student wearing a virtually identical shirt was brought to the attention of the administration of the Middle School and that no action was taken. The Administration acknowledges that in hindsight action should have been taken with respect to this incident as well. The Board understands and is supportive of the difficulties in making these case by case decisions but wishes to establish clearly and without equivocation that in the future any conduct which is violative of either the Dress Code or the Racial [Harassment Policy] is not welcome at any of the Warren Hills Regional Schools and because of the history of racial intimidation, this behavior will not be tolerated. In a simpler time and age the use of the term redneck would not necessarily be offensive when utilized in a school setting. But where, as here, there is a history and background of racial intimidation and problems this conduct will not be permitted.

(*Id.* at 2; *see also* Griffith Certif. ¶ 18 ("With the events outlined above, in Mr. Merluzzi's affidavit and the police reports[,] we approach the new school year mindful that the case by case approach did not work and committed to a zero tolerance approach or this issue to protect all of our students.").) The Board of Education therefore remains

committed to discipline anyone, presumably under both the Dress Code as well as the Racial Harassment Policy, who wears the Foxworthy T-shirt in the future. (Brian Sypniewski Aff. ¶ 6; Matthew Sypniewski Aff. ¶ 6.) Both Brian and Matthew intend to wear the Foxworthy T-shirt to school. (Brian Sypniewski Aff. ¶ 7; Matthew Sypniewski Aff. ¶ 7.) The Board of Education also issued a press release, including a "Chronology of Events Leading Up to the Adoption of the Racial Harassment Policy of the Warren Hills Regional Board of Education," and repeating much of the content of the Board of Education's letter denying the appeal while situating the Foxworthy T-shirt incident within the context of the Policy's adoption.[8] (Thomas Sypniewski Aff. ¶ 14 & Compl. Ex. D: Press Release ("Press Release") at 1-5.)

## II. Events Following Thomas's Suspension

Incidents of racial bias occurred after Thomas's suspension for wearing the Foxworthy T-shirt on March 22, 2001. Several incidents of graffiti, particularly in

[8] Plaintiffs also present evidence attempting to show the non-racist character of the term "redneck," including that Foxworthy was scheduled to appear at a television special including such public figures as the President of the United States, an American Greetings Company line of greeting cards called "Jeff Foxworthy's Redneck Merchandise," a Sony musical disc with the Spanish song "Redneck Meskin Boy," and "a Lynyrd Skynyrd Redneck World Order" hockey shirt available on the Internet. (Reply Aff. of Gerald Walpin filed 8-14-01 ¶ 13 & Ex. A: Press Release dated 7-19-01, *available at*, http://www.fordstheatre.or/Pages/partners/part_galaair.htm (last visited 8-7-01) & Ex. B: American Greetings Greeting Cards & Ex. C: Lo Mas Grande de Little Joe Labels.)

bathrooms, were reported. After discovering the graffiti, certain steps generally were taken, such as calling the police and Merluzzi, having a police report filed, and cleaning off the graffiti. The particular occurrences of graffiti following March 22, 2001 were:

> (1) Graffiti was found on or about March 23, 2001 in a boys' bathroom at the High School. (Merluzzi Certif. ¶ 29 & Ex. H: Copies of Photographs dated 3-23-01 ("3-23-01 Photographs") & Ex. W: Police Investigation Report dated 3-23-01 ("3-23-01 Police Investigation Report") at 50-51, Supplementary Bias Incident Offense Report at 52, Mem. from Ron Griffith dated 2-23-01, Handwritten Summary of Graffiti dated 3-23-01, Copies of Photographs dated 3-23-01.) The words "niggers' suck" was originally written on the bathroom stall. (*See, e.g.*, Merluzzi Certif. ¶ 29; 3-23-01 Photographs; 3-23-01 Police Investigation Report at 50.) The words "Whoever wrote this can s--k my d--k the new black kid" were then written, followed by "No thanks you is a dumb motherfuckin' nigger who don't know how to shut it's fat nigger lips." (*See, e.g.*, Merluzzi Certif. ¶ 29; 3-23-01 Photographs; 3-23-01 Police Investigation Report at 50.) According to Merluzzi, this graffiti extremely disturbed both the administration and the student who used this particular bathroom.[9] (Merluzzi Certif. ¶ 29.)

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[9] The Court generally follows Merzulli's certification for these quotations of various derogatory statements and not any photographs or documents that often reveal irregular spelling and similar inconsistencies.

(2) Graffiti was uncovered in a High School boys bathroom reading "nigger sucks" on or about March 26, 2001. (Merluzzi Certif. ¶ 30 & Ex. I: Mem. from Rob Griffith dated 3-26-01, Violence, Vandalism, and Substance Abuse Incident Report dated 3-26-01, Copy of Photograph dated 3-26-01 & Ex. W: Police Investigation Report dated 3-26-01 at 56, supplementary Bias Incident Offense Report dated 3-26-01 at 58.)

(3) Graffiti, this time in a girls bathroom at the High School, was discovered on or about March 29, 2001. (Merzulli Certif. ¶ 32 & Ex. I: Mem. from Ron Griffith dated 3-29-01 ("3-29-01 Griffith Mem."), Violence, Vandalism, and Substance Abuse Incident Report dated 3-29-01, Copies of Photographs dated 3-29-01 ("3-29-01 Graffiti Photographs") & Ex. W: Police Investigation Report dated 3-29-01 ("3-29-01 Police Investigation Report") at 61, Supplementary Bias Incident Offense Report dated 3-29-01 at 63.) The graffiti said "I hate niggers." (*See e.g.*, Merzulli Certif. ¶ 32; 3-29-01 Griffith Mem.; 3-29-01 Police Investigation Report at 61.)

(4) Two words, one of them being "nigger," were discovered on a minority High School Student's locker on or about April 19, 2001. (Merzulli Certif. ¶ 34 & Ex. L: Copy of Photograph dated 4-19-01 ("4-19-01 Photograph") & Ex. W. Police Investigation Report dated 4-19-01 ("4-19-01 Police Investigation Report") at 70-71, Supplementary Bias Incident Report dated 4-19-01 at 72.)

(5) Merluzzi then found, on or about April 22, 2001, a sign in the High School parking lot altered to read "no niggers allowed," (Merzulli Certif. ¶ 35 & Ex. M: Note from Peter Merluzzi

dated 4-22-01, Copy of Photograph dated 4-23-01 & Ex. W: Police Investigation Incident Offense Report dated 4-23-01 at 76.)

(6) Graffiti in a girls bathroom at the High School was discovered on or about April 27, 2001. (Merluzzi Certif. ¶ 36 & Ex. N: Mem. from Ron Griffith to Mr. Merluzzi dated 4-27-01 ("4-27-01 Griffith Mem."), Copies of Photographs dated 4-27-01 ("4-27-01 Photographs") & Ex. W: Police Investigation Report dated 4-27-01 ("4-27-01 Police Investigation Report") at 83. Supplementary Bias Report dated 4-27-01 at 85, Copies of Photographs at 86-89.) The words "I hate niggers" were found written in large letters on the bathroom wall. (*See*, *e.g.*, Merluzzi Certif. ¶ 36; 4-27-01 Griffith Mem.; 4-27-01 Photographs.)

(7) On or about May 10, 2001, the words "I hate niggers," along with a drawing of the Confederate flag, were found in another part of this same girls bathroom. (Merluzzi Certif. ¶ 37 & Ex. N: Incident Report from Neil B. Corley dated 5-10-01, Copy of Photograph dated 5-10-01 & Ex. W: Police Investigation Report dated 5-10-01 at 90, Supplementary Bias Incident Offense Report at 92, Copies of Photographs at 93-95)

(8) Graffiti was found on or about May 31, 2001 in a High School boys bathroom. (Merluzzi Certif. ¶ 40 & Ex. P: Letter from Ron Griffith dated 5-31-01 ("5-31-01 Griffith Letter"), Copies of Photographs dated 6-01-01 ("6-1-01 Photographs") & Ex. W: Police Investigation Report dated 6-1-01 ("5-31-01 Police Investigation Report") at 90, Supplementary Bias Incident Offense Report at 92.) Originally, "If you want a good fuck don't fuck a nigger" was written, but then other phrases, specifically "Hicks are

pussies," "inbred," and "fuck da hicks" were added as well. (*See e.g.*, Merluzzi Certif. ¶ 40; 5-31-01 Griffith Letter; 6-01-01 Photographs.)

Other non-graffiti incidents also occurred during this time period. A student, at approximately 7:30 a.m. on or about March 28, 2001, reported that two trucks in the student parking lot at the High School were playing music over a loud speaker. (Merzulli Certif. ¶ 31 & Ex. J: Student Report ("3-28-01 Student Report").) The lyrics of the song were repeated, including these words, "Here we are marching to the trampling at the zoo. We washed our hands in nigger's blood and all the mongrels too." (Merzulli Certif. ¶ 31; *see also* 3-28-01 Student Report ("He [sic] we are a marching to the trampling at the zoo. We've washed our hands in nigger's blood and killed the bastards too.") It was discovered that these lyrics were taken from the movie entitled *American History X* but that this excerpt is not contained on any soundtrack recording instead had to be recorded directly from the movie itself. (Merzulli Certif. ¶ 31.)

A Piece of paper was discovered in a mathematics classroom at the High School on or about April 17, 2001. (Merzulli Certif. ¶ 33 & Ex. K: 4-17-01 Paper ("4-17-01 Paper").) This paper said, "My eyes have seen the glory of the trampling at the zoo. We washed ourselves in nigger's blood and all the mongrels too. We are taking down zog machine jew by jew by jew, the white man marches on." (Merzulli Certif. ¶ 33; 4-17-01 Paper.) A few days after the Board of Educations' denial of Thomas's appeal, Thomas also received a letter in the mail stating, "You stupid pollack." (Thomas Sypniewski Aff. ¶ 15.)

A fight occurred at the High School between an African American and a white student on or about May 16,

2001. (*See, e.g.*, Merluzzi Certif. ¶ 38 & Ex. O: Report dated 5-16-01 ("5-16-01 Report") at 1.) The injured participant in this fight was treated for a concussion and received stitches. (Merluzzi Certif. ¶ 38; 5-15-01 Report; 5-16-01 Incident Report at 1.) Both boys were suspended for five days, and the fight was reported to the police and Merluzzi and a police report was filed. (Merluzzi Certif. ¶ 38; 5-15-01 Report; 5-16-01 Incident Report.) Merluzzi believes this fight "represents the culmination, until now, of the two years of racial harassment by this small group of students." (Merluzzi Certif. ¶ 38.) The Court does note that the documentation concerning this fight does not clearly indicate that it was based on prejudice or bias.

It appears that the various programs to deal with racial tension have continued, including guest speakers, assemblies, and Human Relations Commission assistance (Merluzzi Certif. ¶¶ 44-45.) Specifically, religious leaders formed a coalition attempting to deal with racial tensions in the schools as well as the community. (Merluzzi Certif. ¶ 44 & Ex. S: Mem. from Rev. Dr. Scott C. Schantzenbach dated 7-26-01, Press Release dated 7-25-01 at 1-3.) The racial tensions at the High School continue to be a matter of concern and discussion in the local community, with editorial letters and editorials support the administration's actions, specifically against Thomas. (Merluzzi Certif. ¶ 41 & Ex. Q: *No Might About It*, Express-Times, June 27, 2001, at A-10, Letter to the Editor from Rev. Edwin M. Weikel, Bruce Hays, *Community Must Address Intolerance*, Express-Times, April 15, 2001, at A-10; Letter to the Editor from Sarah Trimmer.)

Since his suspension, Thomas has witnessed students wearing T-shirts with the following writings: (1) "When in doubt, pull it out;" (2) "Budweiser"; (3) a crucifix within a

"Prohibited" road sign; (4) "Malcolm X"; and (5) a Confederate flag,. (Thomas Sypniewski Aff. ¶ 18.) He also has seen several bumper stickers on cars located on school grounds with messages such as "Discourage inbreeding – Ban Country music." (*Id.* ¶ 19.) Thomas asked Chalupa why this statement was not banned, and Chalupa told him it was a message of opinion and hence not offensive. (*Id.*) Two security guards then found this sticker offensive and ordered it removed. (Compl. ¶ 46.) According to Griffith, given that 2,000 students attend the High School, occurrences will inevitably elude discovery. (Griffith Certif. ¶ 21.) He emphasizes, however, that the past incidents have demonstrated the need for greater vigilance and enforcement. (*Id.*)

## DISCUSSION

### I. Introduction

The Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 1343 (a) (3). The parties agree that plaintiffs possess standing and that this injunctive dispute is ripe and not moot. The moving plaintiffs are Matthew and Brian who currently attend the High School ("Plaintiffs"). (Brian Sypniewski Aff. ¶¶ 6-7; Matthew Sypniewski Aff. ¶¶ 6-7; Appeal Denial at 2.) Although Thomas was disciplined under the Dress Code (*see, e.g.*, Appeal Denial at 1), the school officials have taken the position that wearing the Foxworthy T-shirt to school violates the Racial Harassment Policy as well. (Merluzzi Certif. ¶ 49; Griffith Certif. ¶ 17.)

Plaintiffs seek to preliminarily enjoin Defendants from:

> (i) enforcing the Warren Hills Regional Board of Education Student Handbook to the extent that it prohibits clothing "portraying racial, ethnic, or religious stereotyping" without requiring evidence that the particular message being prohibited actually "causes disruption in the classroom,"
>
> (ii) enforcing the Policy on Racial Harassment and Intimidation adopted by the Warren Hills Regional Board of Education on March 6, 2001, to the extent that it prohibits "written material . . . that is racially divisive or creates ill will or hatred," and
>
> (iii) taking any disciplinary action against Matthew Sypniewski and/or Brian Sypniewski if they wear to the High School their [Foxworthy] T-shirt. . . .

(Notice of Mot. filed 6-25-01 at 2.)

We must therefore address the quoted sections of the Dress Code and of the Harassment Policy in rendering our decision. As previously noted, the relevant portion of the Dress Code prohibits clothing "portraying racial, ethnic, or religious stereotyping."[10] The relevant portion of the Racial Harassment Policy states:

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[10] Plaintiffs at this juncture do not challenge the Dress Code insofar as it considers inappropriate "[a]ny clothing deemed gang-related, including the way the clothing is worn" or "[c]lothing displaying or imprinted with nudity, vulgarity, obscenity, profanity, double entendre pictures or slogans (including those related to alcohol, drugs

(Continued on following page)

> District employees and students shall not at school, on school property or at school activities wear or have in their possession any written material, either printed or in their own handwriting, that is racially divisive or creates ill will or hatred. (Examples: clothing, articles, material, publications or any item that denotes Ku Klux Klan, Arayan Nation – White supremacy, Black Power, Confederate flags or articles, Neo-Nazi or any other "hate" group. This list is not intended to be all inclusive.)

The Court's review will be limited to these aspects of the two policies.

Injunctive relief is an "extraordinary remedy, which should be granted only in limited circumstances." *Frank's GMC Truck Ctr. v. General Motors Corp*, 847 F.2d 100, 102 (3d Cir. 1988) (citing *United States v. City of Philadelphia*, 644 F.2nd 187, 191 n.1 (3d Cir. 1980)). Under well-established law governing the granting of preliminary injunctive relief, the Court must consider whether: (1) the party seeking a preliminary injunction has shown a reasonable probability of success on the merits; (2) the party will be irreparably injured by the denial of relief; (3) granting preliminary relief will result in even greater harm to the nonmoving party; and (4) granting the preliminary relief will be in the public interest. *See, e.g.*, *ACLU v. Reno*, 217 F.3d 162, 172 (3d Cir. 2000), *cert. granted sub nom., Ashcroft v. ACLU*, 121 S. Ct. 1997 (2001); *ACLU of N.J. v. Black Horse Pike Reg'l Bd. of*

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and tobacco)." (Dress Code.) To the extent that the Board may at some time invoke that part of the Dress Code against the T-shirt, that is beyond the scope of the present motion.

*Educ.*, 84 F.3d 1471, 1477 n.2 (3d Cir. 1996) (en banc) (citations and quotation omitted). When relevant, a Court must also consider possible harm to interested third parties. *See, e.g.*, *Oburn v. Shapp*, 521 F.2d 142, 152 (3d Cir. 1975). "The injunction should issue only if the plaintiff produces evidence sufficient to convince the district court that all four factors favor preliminary relief." *AT&T Co. v. Winback & Conserve Program, Inc.*, 42 F.3d 1421, 1427 (3d Cir. 1994) (citations omitted).

## II. Reasonable Probability of Success on the Merits

The party seeking a preliminary injunction must demonstrate a "reasonable probability of eventual success in the litigation." *Kershner v. Mazurkiewicz*, 670 F.2d 440, 443 (3d Cir. 1982). In evaluating whether a moving party has satisfied this first part of the preliminary injunction standard, it must be remembered that "[i]t is not necessary that the moving party's right to a final decision after trial be wholly without doubt; rather, the burden is on the party seeking relief to make a [p]rima facie case showing a reasonable probability that it will prevail on the merits." *Oburn v. Shapp*, 521 F.2d 142, 148 (3d Cir. 1975) (citations omitted).

This motion requires us to examine, at least on a preliminary basis, whether the portions of the Dress Code and the Racial Harassment Policy in issue may be justified as a permissible regulation of speech within the school district. We begin by reviewing Supreme Court authority on the permissible regulation of student speech in the school setting.

A. The Regulation of Public School Student Expression

The federal constitutional restrictions on student speech in public schools were established by three seminal Supreme Court decisions: (1) *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969); (2) *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986); and (3) *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988).[11] In *Tinker*, the Court established "the framework for student free speech claims." *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 211 (3d Cir. 2000). Students wearing black armbands to protest the Vietnam War were suspended for violating a school policy against wearing such an armband. *Tinker*, 393 U.S. at 504. The Supreme Court, after recognizing that the wearing this armband is a symbolic act within the Free Speech Clause of the First Amendment, *Id.* at 505-06,[12] stated:

> First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of

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[11] The First Amendment to the United States Constitution provides, in relevant part that "Congress shall make no law ... abridging the freedom of speech." U.S. Const. amend. I. The Fourteenth Amendment applied this constitutional restriction to the states. *See, e.g., Stromberg v. California*, 283 U.S. 359 (1931).

Plantiffs also argue that Defendants violated the New Jersey Constitution. (Mem. of Law in Supp. of Pls.' Mot. for Prelim. Inj. Relief at 9 & n.1) The Court does not consider the possible applicability of New Jersey constitutional law to this motion because of the absence of any significant discussion of this law on the part of the parties.

[12] There is no question in this case that the Foxworthy T-shirt is a form of expression.

> speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years.

*Id.* at 506 (citations omitted); *see also, e.g., Id.* at 512 ("'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (citation omitted.))). The Court also acknowledged, however, that it must honor the authority of states and school officials to control and run their schools, within the basic framework of constitutional rights. *Id.* at 507 (citing *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968); *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923)); *see also, e.g., West v. Derby Unified Sch. Dist. No. 260*, 206 F.3d 1358, 1363 (10th Cir. 2000) ("[J]udicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraining . . . by and large, public education in our Nation is committed to the control of state and local authorities." (quoting *Epperson*, 393 U.S. at 104.)), *cert. denied*, 531 U.S. 825 (2000).

In attempting to balance students' freedom of speech with state authority over the conduct and control of their educational institutions, the Tinker Court announced a rule to be applied at least when a public school is attempting to regulate speech akin to the wearing of armbands to protest a war. The court held that, speech, even if it occurred outside the classroom setting, is entitled to protection against infringement unless it "'materially and substantially interfer[es] with the requirements of appropriate discipline in the operation of the school'" or collides with the rights of others. *Id.* at 740 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (1966)). "But conduct by the student, in class or out of it, which for any reason –

whether it stems from time, place or type of behavior – materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course not immunized by the constitutional guarantee of freedom of speech." *Id.* (citation omitted). The Court emphasized that an "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Id.* at 508. The Court therefore reversed the ruling in favor of the school because of the absence of any facts which might have led school officials to predict substantial disruption or material interference from the black armbands as well as the absence of any actual disturbance or disruption on school property.[13] *Id.* at 514.

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[13] The Supreme Court further emphasized that school officials had not prohibited wearing all political or controversial symbols, and some students wore political campaign buttons and even the Iron Cross. *Tinker*, 393 U.S. at 510. The Court fit this apparent disparity of treatment into its overall approach by stating that "the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible. *Id.* at 511; *see also, e.g., Castorina v. Madison County Sch. Bd.*, 246 F.3d 536, 541 (6th Cir. 2001) (reversing summary judgment for school defendants in case involving student disciplining for wearing Confederate flag T-shirts because of factual issues as to lack of discipline for wearing Malcolm X-related clothing); *Castorina*, 246 F.3d at 547 (Kennedy, J., concurring in part and dissenting in part) (stating that evidence of likely disruption is necessary and sufficient for school to act). Thomas avers that, since his suspension, he has seen students wearing, not only a T-shirt with the Confederate flag, but also shirts with such writing as "When in doubt, pull it out" and "Malcolm X." (Thomas Sypniewski Aff. ¶ 19.) He also has seen bumper stickers with such messages as "Discourage inbreeding – Ban Country Music," a message that Chalupa did not considered [sic] banned. (*Id.*) Given the absence of more specific arguments relating to this issue of discrimination, the Court need not decide it, at least at this point in time.

The next Supreme Court case added an exception to the *Tinker* substantial disruption test. In *Fraser*, a high school student gave a speech nominating a fellow student for an elective position containing lewd language, including elaborate and explicit sexual metaphors, to a school assembly. 478 U.S. at 677-78. The Court found the punishment of the student to be appropriate under the First Amendment. *Id.* at 685. It emphasized that an essential function of public education is "'to prepare pupils for citizenship in the Republic'" and this education "'must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.'" *Id.* at 681 (quoting C. Beard & M. Beard, *New Basic History of the United States* 228 (1968)). The Court acknowledged that such education for citizenship includes tolerance for divergent and unpopular political and religious viewpoints. *Id.* at 681. Schools, however, must consider the sensibilities of other students, and the freedom to express unpopular opinions must be balanced against the interest in teaching students the limitations of "socially appropriate behavior." *Id.* The Court in *Fraser* emphasized that the rights of public school students are not necessarily as expansive as the rights of adults in society. *Id.* at 683 (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 340-42 (1985)). It held that schools therefore may prohibit and punish lewd, vulgar, indecent, or offensive speech, such as the sexually explicit nominating speech, as part of their mission of imparting the values and requirements of life in a civilized, democratic society. *Id.* at 683-686. The Court emphasized that the school bears the responsibility for determining the manner of speech appropriate in a school assembly or classroom setting. *Id.* at 683.

The final Supreme Court case recognized another exception to the *Tinker* requirement in cases of school-sponsored speech. In *Hazelwood*, former students challenged the school's decision to delete certain pages from the school newspaper, including articles on pregnancy and divorce. 484 U.S. at 262-66. The Court, while noting that students maintain free speech rights when they enter the school setting, indicated that such rights may be limited under certain circumstances such as happened in *Fraser*. *Id.* at 266-67. The Court concluded that a distinction exists between student speech that is tolerated, at issue in *Tinker*, *Id.* at 270, and school-sponsored speech, which is speech "that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." *Id.* at 271. The Supreme Court therefore held that school officials "do not offend the First Amendment by exercising editorial control over the type and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Id.* at 273 (citations omitted).

This trilogy of Supreme Court cases has been interpreted, most significantly by the Third Circuit in its very recent decision in *Saxe v. State College Area School District*, 240 F.3d 200 (3d Cir. 2001), *Id.* at 214, as providing for three approaches to the question of student speech in the public school setting. First, pursuant to *Fraser*, a school may forbid "lewd, vulgar, or profane language," regardless of whether such speech results in or threatens to result in substantial disruption. *Id.* at 212; *see also, e.g., Lavine v. Blaine Sch. Dist.*, 257 F.3d 981, 989 (9th Cir. 2001); *Killion v. Franklin Reg'l Sch. Dist.*, 136 F. Supp. 2d 446, 453 (W.D. Pa. 2001) (citing *Saxe*, 240 F.3d at 214); *Pyle v. S. Hadley Sch. Comm.*, 861 F. Supp. 157, 166 (D.

Mass. 1994), *question on other grounds certified by* 55 F.3d 20 (1995). School authorities also may control school-sponsored speech, or speech a reasonable observer would view as the school's speech, based on a legitimate pedagogical interest. *Saxe*, 240 F.3d at 214; *see also, e.g., Lavine*, 257 F.3d at 988; *Killion*, 136 F. Supp. 2d at 453 (citing *Saxe*, 240 F.3d at 214); *Pyle*, 861 F. Supp. at 166. If the speech in question does not fall under the two previous categories, it is subject to the general rule in *Tinker*, and it therefore "may be regulated only if it would substantially disrupt school operations or interfere with the rights of others."[14] *Saxe*, 240 F.3d at 214 (citations omitted); *see also Lavine*, 257 F.3d at 988-99; *Killion*, 136 F. Supp. 2d at 453 (citing *Saxe*, 240 F.3d at 214); *Pyle*, 861 F. Supp. at 166; *Clark v. Dallas Independent Sch. Dist.*, 806 F. Supp. 116, 120 (N.D. Tex. 1992).

While these restrictions impose real constraints on a school's ability to regulate student speech, a school is not completely without the means to ensure the existence of a

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[14] Plaintiffs apparently contend that *Saxe* provides that "'only harassment that objectively denies a student to equal access to a school's education resources' may be prohibited." (Mem. of Law in Supp. of Pls.' Mot. for Prelim. Inj. Relief at 11 (quoting *Saxe*, 240 F.3d at 210).) *Saxe*, however, did not establish that such a requirement is a further prerequisite for regulation of expression. The standard above refers to an element of liability for student-on-student sexual harassment under Title IX. *Saxe*, 240 F.3d at 204-05 (quoting *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 651 (1999)).) The Third Circuit noted that the policy at issue extended beyond this standard, as well as other standards under federal harassment law, but that this further scope does not necessarily render the policy unconstitutional. *Id.* at 210-11. Therefore, while general principles of anti-harassment law may be relevant, the ultimate determining standard is the *Tinker* substantial disruption approach and its exceptions.

safe and productive learning environment, even under the *Tinker*, substantial disruption test. In fact, a school may prohibit or punish student speech based on "a specific and significant fear of disruption" or interference with student rights, *Saxe*, 240 F.3d at 211; *see also, e.g., Tinker*, 393 U.S. at 514 (noting absence of facts that might reasonably have led school to forecast substantial disruption or material interference). The school need not wait for the particular speech in question to cause substantial disruption or interference with the rights of others. *See, e.g., Lavine*, 257 F.3d at 989 (citations omitted); *West*, 206 F.3d at 1366-67 (quotation omitted). In fact, a school's restrictions on speech, even when not occurring as a prior restraint, may be upheld even if the particular speech in question failed to result in sufficient disruption as long as adequate grounds to predict or forecast such results exist. *See, e.g., West*, 206 F.3d at 1366-67 ("The fact that [the student's conduct] may not have resulted in an actual disruption of the classroom . . . does not mean that the school had no authority to act. The District had the power to act to prevent problems before they occurred. . . . " (quoting *West v. Derby Unified Sch. Dist. No. 260*, 23 F. Supp. 2d 1223, 1233 (D. Kansas 1998)); *Boucher v. Sch. Bd. of the Sch. Dist. of Greenfield*, 134 F.3d 821, 827-28 (7th Cir. 1998) (applying "reasonable forecast of disruption" test to punishment after publication). Defendants, therefore, are correct when they contend that it is unnecessary to show that the particular speech being prohibited "disrupted classroom activities or harassed anyone." (Defs' Mem. of Law in Opp'n to Pls' Mot. for Prelim. Inj. Relief ("Defs.' Mem.") at 15).

To restrict student speech under the *Tinker* rationale, it is essential that the school have a well-founded belief,

particularly based on past events occurring due to similar speech, that such disruption or interference with the rights of other students will occur. *See, e.g.*, *West*, 206 F.3d at 1366 ("The evidence in this case, however, reveals that based upon recent past events, [the school] had reason to believe that a student's display of the Confederate flag might cause disruption and interfere with the rights of other students to be secure and let alone" (citation omitted); *Boucher*, 134 F.3d at 827 ("The Court has indicated that in the case of student expression, the relevant test is whether school authorities 'have reason to believe' that the expression will be disruptive." (citations and emphasis omitted)); *Xillion*, 136 F. Supp. 2d at 455 (quoting *Saxe*, 240 F.3d at 212).

We find, for purposes of the present injunctive application only, that Defendants did adopt the Racial Harassment and Intimidation Policy in the Spring of 2000 based upon a well-founded expectation of disruption or interference with the rights of other students, which expectation was reasonably related to past and ongoing events arising out of racially-oriented speech similar to that which the Policy seeks to restrict. It is our further preliminary finding that the ongoing circumstances prevailing after enactment of the Policy, as documented in Defendants' submissions to this Court, give continued constitutional validity to the existence of that Policy at the present time. Accordingly we reach the preliminary conclusion that the Racial Harassment Policy may be a permissible restriction upon student speech under the rule established in *Tinker* and its progeny. *See, e.g.*, *Saxe*, 240 F.3d at 213 (" . . . However, if a school can point to a well-founded expectation of disruption – especially one based on past incidents

arising out of similar speech – the restriction may pass constitutional muster.")

We cannot reach the same conclusion as to the challenged language of the Dress Code. First, it was enacted prior to the present disturbances and there is no evidence in the record to indicate that the school had any well-founded expectation of disruption on the basis of racial problems when it was enacted. Moreover, by its terms it goes beyond prohibiting clothing "portraying racial . . . stereotyping," and also reaches "ethnic or religious stereotyping." (Dress Code.) There is no evidence to indicate that the school had or has any well-founded expectation of disruption with respect to those categories of speech. It therefore appears that the threshold requirement of *Tinker* has not been met as to the challenged language of the Dress Code. For these reasons we will not continue our analysis of the Dress Code further at this time, but will next turn our attention to Plaintiffs' facial challenges to the Racial Harassment policy.

B. *Overbreadth and Vagueness*

Generally, facial challenges are very difficult to sustain because the party challenging the law must show the absence of any circumstances to which the law in question would be valid. *See, e.g., West*, 206 F.3d at 1367 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). Ordinarily, a person to whom a certain law may be constitutionally applied cannot complain that such a law is unconstitutional because of possible circumstances in which its application would in fact be unconstitutional. *See, e.g., id.* at 1367 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973)).

The doctrine of overbreadth, however, is an exception to this general rule against facial challenges where the challenger's actions or speech are subject to constitutional regulation, *see, e.g.*, *id.* at 1367 (citation omitted). The related doctrines of overbreadth and vagueness ensure that, due to the vital importance of the First Amendment's protection of freedom of speech, the state's power of regulating speech "must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940), *quoted in*, 4 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure* § 20.8, at 263 & n.1 (3d ed. 1999). A regulation of speech is facially unconstitutional as overbroad when "'a likelihood [exists] that the statute's very existence will inhibit free expression' by 'inhibiting the speech of third parties who are not before the Court.'" *Saxe*, 240 F.3d at 214 (quoting *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984)). According to the Supreme Court, the doctrine, particularly because of the effect of invalidating a speech regulation on its face when the plaintiff's own conduct might be subject to punishment in any case, is "'strong medicine'" to be "employed . . . with hesitation, and then, only as a last resort.'" *Los Angeles Police Dept. v. United Reporting Publ'g Corp.*, 528 U.S. 32, 38 (1999) (quoting *Broadrick*, 413 U.S. at 615). To make a law unconstitutional, the overbreadth "must be 'not only real but substantial in relation to the [regulation's] plainly legitimate sweep.'" *Saxe*, 240 F.3d at 214 (quoting *Broadrick*, 413 U.S. at 615). A court must also consider any limiting construction given to the regulation in question. *See, e.g.*, *Saxe*, 240 F.3d at 215; *West*, 206 F.3d at 1368; *Killion*, 136 F. Supp. 2d at 458.

The language in the Racial Harassment Policy which is here in issue provides in relevant part that students shall not:

> wear or have in their possession any written material . . . that is racially divisive or creates ill will or hatred. (Examples: clothing, articles, material, publications or any item that denotes Ku Klux Klan, Arayan [sic] Nation – White Supremacy, Black Power, Confederate flags or articles, Neo-Nazi or any other hate" group. This list is not intended to be all inclusive.)

It should first be noted that this is the exact language which withstood constitutional challenge in *West v. Derby Unified Sch. Dist. No. 260*, 206 F.3d 1358, 1361 (10th Cir. 2000), *cert. denied*, 531 U.S. 825 (2000). Indeed, the Policy in this case was expressly selected by the Board based upon that precedent. (Merluzzi Certif. ¶¶ 25-26.) Furthermore, the Policy in this case was adopted shortly after the Third Circuit rendered its decision in *Saxe*, and this Policy does not suffer from several of the overbreadth defects found to exist in the policy in that case.[15]

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[15] As Defendants suggested at oral argument, the policy at issue in *Saxe* was much broader than the Racial Harassment Policy. Even as construed by the Third Circuit, it applied to "(1) verbal or physical conduct (2) that is based on one's actual or perceived personal characteristics." 240 F.3d at 216. These personal characteristics included such matters as clothing, appearance, hobbies, values, and social skills. *Id.* at 210 (noting that policy exceeded scope of federal anti-discrimination laws). It therefore was not limited to written materials that are racially divisive or create ill will or hatred. Furthermore, unlike the Racial Harassment Policy, the policy at issue in *Saxe* inappropriately attempted to punish expression that, while not causing disruption, is merely intended to cause such disruption. *Id.*

It is true that the Policy in issue in this case does not, on its face, require a threshold showing by the Board that the prohibition is restricted to those racially oriented materials which it reasonably anticipates will cause substantial disruption or interference in the school. However, the Tenth Circuit in *West* upheld virtually identical policy language against an overbreadth challenge made by a student disciplined for drawing a Confederate flag. *Id.* at 1362-63, 1367-68. It did so after applying the policy to the particular facts raised by the plaintiff and holding that the student's punishment was constitutionally appropriate because school officials possessed the reason to believe his display of the Confederate flag might cause disruption and interfere with the rights of other students. *Id.* at 1366. Nor does our reading of *Saxe* reveal any requirement that the "substantial disruption" language be expressly articulated within the language of the policy itself. Indeed, in *Saxe* the Court searched the record in vain for "any particularized reason as to why [the school] anticipates substantial disruption from the broad swath of student speech prohibited under [their] Policy," 240 F.3d at 217, and finding none, the court concluded that the *Saxe* policy was unconstitutionally overbroad for that reason as well as other enumerated reasons. *Id.* (*See* n. 15 *supra*.)

As the Third Circuit reiterated in *Saxe*, before declaring a policy unconstitutional a court "must first determine whether it is susceptible to a reasonable limiting construction: 'the elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'" *Id.* at 215 (quoting *Stretton v. Disciplinary Bd. of the Supreme Court of Pennsylvania*, 944 F.2d 137, 144 (3d Cir. 1991)). Based upon the extensive

record of deliberations and events which led to the enactment of the Racial Harassment Policy in this case, we make a preliminary finding that an appropriate narrow reading of the relevant portion of the Policy would require the following elements before speech could be deemed violative: (1) wearing or possession of any written material (2) that is either (2a) racially divisive or (2b) creates racial ill will or (2c) creates racial hatred and that (3) is such that the school has a specific and well-founded fear that it will substantially disrupt or interfere with the work of the school or the rights of other students. As thus narrowed we conclude, again as a preliminary matter, that the challenged section of the Racial Harassment Policy in this case is not unconstitutionally overbroad, because it is in fact based upon just such a specific and well-founded apprehension requiring the very limitations upon speech which are described in the Policy.

We reach a similar result in considering whether the challenged portions of the Racial Harassment Policy are unconstitutionally vague. The vagueness doctrine provides that a restriction is void if it fails to give fair warning as to the prohibited conduct or allows for arbitrary and discriminatory enforcement because of the absence of adequate standards. *See, e.g.*, *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (citations omitted); *Smith v. Goguen*, 415 U.S. 566, 572-73 (1974) (footnotes omitted); *Killion*, 136 F. Supp. 2d at 459 (citations omitted); *West*, 23 F. Supp. 2d at 1235 (citing *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). Such a vague regulation, similar to a substantially overbroad prohibition, may encourage individuals to "'steer far wider of the unlawful zone' than if the boundaries of the forbidden areas were clearly marked." *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964)

(citations omitted). However, because of the necessity to discipline students for unanticipated and disruptive conduct, it is not necessary that school rules be as detailed as criminal provisions. *See, e.g.*, *Fraser*, 478 U.S. at 686.

The Policy in this case gives specific examples of materials that have been identified as prohibited, and states that "this list is not intended to be all inclusive." As explained by Defendants in the record here, the many permutations of expression that would violate the Policy cannot be anticipated at the outset, and the implementation of the policy does require that the school add to that non-exclusive list those items which it concludes in its experience fall within the same type of speech. (*See, e.g.*, Merluzzi Certif. ¶ 9.) In *West*, the Court rejected plaintiff's vagueness challenge because plaintiff had knowledge that his conduct violated the school policy. *See West*, 206 F.3d at 1367. In the present case, at this juncture when the Court is called upon to consider prospective injunctive relief only, it is abundantly clear that the Board has determined, and the Plaintiffs know, that the material in issue here has been added to the "non-exclusive" list of items prohibited under the policy. In that connection we make no comment as to the circumstances surrounding the suspension of Thomas in March of 2000 shortly after the Policy was adopted. But on the present application for preliminary injunction we do not conclude that plaintiff has shown a likelihood that the Policy is unconstitutionally vague on its face.

C. *The Policy As Applied to the Foxworthy T-Shirt*

Plaintiffs challenge not only the facial constitutionality of the Racial Harassment Policy, but also its application to

their Foxworthy T-shirt. Again, on this application for preliminary injunction we do not review the circumstances under which Thomas was disciplined for wearing it during the semester before his graduation last Spring. The issue before us now is whether the brothers Matthew and Brian, who are current students in the High School, have shown a reasonable likelihood of success on their contention that the Racial Harassment Policy cannot constitutionally be applied to prohibit their wearing of the same shirt during the school year now beginning. (Not. of Motion filed 6-25-01, at 2.)

The comedian Jeff Foxworthy, according to Plaintiffs, makes fun of himself and others like him for enjoying country music, having a southern accent, and driving a pickup truck – which Mr. Foxworthy portrays as the attributes of a redneck. (Complaint ¶ 16.) Tom, Brian and Matthew are fans of Foxworthy, whose first album, "You Might Be A Redneck If . . . ," sold more copies than any other comedy album in history. (*Id.* ¶ 15.) Foxworthy has performed by invitation this year at the White House, which plaintiffs assert is evidence that Foxworthy's humor is neither divisive nor creates ill will, but is "part of Americana." (*Id.*, ¶ 17.) The shirt was purchased by Plaintiffs at Wal-Mart, which Plaintiffs understand to be a "family-friendly store, and refuses to sell vulgar or racially divisive or bigoted products." (*Id.*, ¶ 20.) Plaintiffs assert on information and belief that Wal-Mart has sold a large quantity of that T-shirt without any complaint that it is hostile or harassing toward any racial, ethnic or religious group. (*Id.*)

Defendants acknowledged at oral argument that the justification for prohibiting that particular shirt must be found, if at all, under *Tinker* and its progeny, rather than

under the *Fraser* or *Hazelwood* approaches. In other words, for purposes of this injunctive application Defendants rely upon the rationale that the wearing of that shirt in school under the current circumstances gives rise to a well-founded apprehension of school authorities that it will substantially disrupt or interfere with the work of the school or the rights of other students. Thus for purposes of the present motion we need not explore whether the shirt could also be prohibited, for example, under the *Fraser* lewdness standard or the *Hazelwood* school-sponsored speech standard.

The Court agrees with Defendants that, at least at this preliminary injunction stage, they have sufficient grounds to ban the Foxworthy T-Shirt. Such grounds, contrary to Defendants' arguments. (Defs.' Mem at 15-18), do not rest on the problematic basis of Thomas's motivations or intent.[16] Instead, this conclusion as premised on the extensive factual background provided by Merluzzi and Griffith regarding the history of racial tensions, particularly in the High School. From the incident in October of 1999 involving the white student with "black

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[16] Because this motion seeks prospective relief regarding the future prohibition of the Foxworthy T-shirt, such a specific inquiry into Thomas's intent on March 22, 2000 when he was punished for wearing the Foxworthy T-shirt is not a proper focus of inquiry. The Court also sees such a focus on a student's intent in making certain expressions as obscuring the primary focus under *Tinker* upon the effect or threatened effect of the speech in question. *Cf.*, *e.g.*, *Saxe*, 240 F.3d at 216-17 (attacking policy's prohibition of speech merely intending to disrupt); *Pyle*, 861 F. Supp. at 173 (expressing respect and sympathy for students who so strongly defended right to free expression as well as defendants). The Court need not and does not decide the specific role of student motivation and intent in cases of the regulation of speech.

face" and a rope tied as a noose around his neck (Merlucci Certif. ¶ 4) to the fight between an African American student and a white student in May of 2001 (*see, e.g., id.* ¶ 38), the School District has confronted serious racial tensions.[17] Included in these events are various acts of graffiti using offensive racial slurs (*see, e.g.*, Merluzzi Certif. ¶¶ 14; 29-32, 34-37, 40), the display of a large Confederate flag over the back of a student's truck in the High School's parking lot on December 4, 2000 (*see, e.g., id.* ¶ 22), the playing of lyrics from the movie *American History X* on or about March 28, 2001 (*see, e.g., id.* ¶ 31), and the confrontation between the group of students and a student who was friendly with minority students and his

[17] Plaintiffs attempt to limit matters to be considered to the period from October of 2000, when Merluzzi stated at the Board of Education meeting that the School District had no race problem, to March 22, 2001, the date Thomas was suspended. (Reply Mem. of Law in Supp. of Pls.' Mot. for Prelim. Inj. Relief ("Pls.' Reply Mem.") at 1-2; Reply Aff. of Gerald Walpin ("Walpin Reply Aff.") ¶¶ 5-6.) Such an approach is inappropriate. Setting aside the possibility that Merluzzi was simply incorrect when he claimed no racial problem existed in October of 2000, incidents occurring prior to this statement remain relevant to consider whether Defendants now have a sufficient basis to fear substantial disruption to the work or discipline of the school arising from any future use of the Foxworthy T-shirt. After all, such incidents, perhaps insufficient to create "a race problem" on their [sic] alone, may combine with later incidents to form such a race problem requiring action by Defendants. Turning to the end of the period, while it is possible that "post-March 22, 2001 incidents cannot be considered to justify the suspension of [Thomas] or March 22, 2001" (Pls.' Reply Mem. at 2; *see also* Walpin Reply Aff. ¶¶ 6), this Court is not primarily considering whether this suspension was constitutionally valid. Instead, the Court must consider whether Defendants may prohibit students, including Matthew and Brian, from wearing the Foxworthy T-shirt at school pending the resolution of this litigation.

father.[18] (*see, e.g.*, *id.* ¶¶ 19-20). These problems especially include the activities of the "Hicks," most particularly their involvement in White Power Wednesdays, the display of Confederate flags, and the events of September 20, 2000, particularly the waving of the Confederate flag through the High School hallway and the racially offensive materials and jokes. (*See, e.g.*, *id.* ¶¶ 8-14; Griffith Certif. ¶¶ 5-12.)

While, as Plaintiffs point out, at least most of these occurrences did not specifically involve the term "redneck" or Thomas himself (*see, e.g.*, Reply Mem. of Law in Supp. of Pls.' Mot. for Prelim. Inj. Relief ("Pls.' Reply Mem.") at 2-5.), the Court concludes that this past history is sufficiently similar in kind to allow the Defendants to possess, for purposes of preliminary injunctive relief, a specific and significant fear of substantial disruption arising out of allowing the Foxworthy T-shirt to be worn at school. Plaintiffs, most likely in response to Defendants' own claims, at times appear to insist that the term "redneck" or even the Foxworthy T-shirt itself must have resulted in past substantial disruption. (*See, e.g.*, Pls.' Reply

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[18] Defendants admit that this confrontation with the student and his father was "a serious incident . . . warranting a cooperative effort of both the community and the schools to insure against its repetition." (Reply Mem. of Law in Supp. of Pls.' Mot. for Prelim. Inj. Relief (Pls.' Reply Mem.") at 2; Reply Aff. of Gerald Walpin filed 8-14-01 ("Walpin Reply Aff.") ¶ 8.) They, however, also argue that, under *Saxe*, "interpreting the Policy 'to cover conduct occurring outside of school premises . . . raise[s] additional constitutional questions." (Pls.' Reply Mem. at 9 n.9 (quoting *Saxe*, 240 F.3d at 216 n.11).) The Court, however, is merely considering this incident insofar as it may provide a basis for Defendants to predict future disruption in connection with wearing the Foxworthy T-shirt at school.

Mem. at 1-5; Reply Aff. of Gerald Walpin filed 8-14-01 ("Walpin Reply Aff.") ¶¶ 9-17.) Similarly, both parties emphasize the role, or lack of a role, of Thomas in any past expression or occurrences resulting in substantial disruption.[19] (Pls.' Reply Mem. at 1-5; Walpin Reply Aff. ¶¶ 9-17.)

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[19] Past incidents and expressions by Thomas, while discussed and argued in some detail by the parties, are not of particular significance to this Court at this juncture. In particular, as noted before, this motion is not specifically about Thomas and his past but whether prospective relief ought to be granted enjoining, *inter alia*, any disciplining of Matthew or Brian for wearing the Foxworthy T-shirt during this school year. The Court's decision does not depend on such contested matters as whether Thomas is or was a member of the group called the "Hicks" or possibly the "Rednecks," (*see, e.g.*, Griffith Certif. ¶ 12; Merluzzi Certif. ¶¶ 14, 17, 43; Thomas Sypniewski Reply Aff. ¶ 2; Walpin Reply Aff. ¶¶ 10-11; Defs.' Mem. at 22; Pls.' Reply Mem. at 3-4.) The Court therefore will not focus on these aspects, and it particularly refuses to decide whether Thomas was one of the students responsible for "rampant racism." (Defs.' Mem. at 22.)

The Court, however, must clarify the admissibility of evidence in the context of a preliminary injunction motion. Plaintiffs apparently contend that much of the evidence submitted by Defendants constitutes hearsay. For instance, they claim that Merluzzi's basis for claiming that the "Hicks" are known as the "Rednecks" is that many high school students familiar with the group "are also of the opinion that [they] also call themselves the 'rednecks.'" (Pls.' Reply Mem. at 4 n.3; *see also* Walpin Reply Aff. ¶ 4 n.3.) They therefore contend that this opinion of unidentified persons constitutes hearsay. (Pls.' Reply Mem. at 4 n.3; *see also* Walpin Reply Aff. ¶ 4 n.3.) While the nature of the evidence may certainly be taken into consideration, 13 James Wm. Moore et al., *Moore's Federal Practice* § 65.23[2] (3d ed. 2000), evidentiary rules are relaxed in the preliminary injunction context, *CFTC v. Am. Metals Exch. Corp.*, 693 F. Supp. 168, 173 (C.N.J. 1988), and "hearsay materials and evidence other than live testimony are properly considered by the Court in preliminary injunction proceedings," *Am. Metals Exch. Corp.*, 693 F. Supp. at 173; Moore, *supra*, § 65.23[2]. In any case, it also appears that the hearsay rule is not directly applicable because these statements are not offered "to prove the truth of the matter asserted"

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Plaintiffs further stress that no evidence exists of any disruptive actions[20] in connection with the Foxworthy T-shirt and that Defendants cannot rest on, in Griffith's words, "the possibility that the term 'redneck' would incite some form of violence and at a minimum be offensive and harassing to our minority population." (Pls.' Reply Mem. at 10 (quoting Griffith Certif. ¶ 15).) In fact, Plaintiffs, in their briefs, emphasize that Thomas, Matthew and Brian wore the Foxworthy T-shirt on numerous occasions without any problems. (*Id.* at 12 n.10.) Plaintiffs also contend that any prohibition would be unconstitutional because Defendants present no evidence of any student complaining of the Foxworthy T-shirt. (*Id.* at 11-12.) They contend that, just as both Merluzzi and Broscious stated that the Confederate flag could not be banned without directly connected actions, the Foxworthy T-shirt also cannot be prohibited because no evidence connects it with any disruptive occurrences and, unlike the Confederate flag, no one has complained about the Foxworthy T-shirt, at least until Thomas's suspension. (Pls.' Reply Mem. at 4-5; Walpin Reply Aff. ¶¶ 15-16.) Plaintiffs' approach, however, misconceives the fundamental bases of the substantial disruption test when applied to specific expression.

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but to show notice to and the state of mind of the Defendants regarding the school environment. Fed. R. Evid. 801(c).

[20] In fact, Plaintiffs appear to contend that, between the October 3, 2000 meeting and the suspension of Thomas, only one incident of disruption occurred, specifically the incident involving the student and his father at their home. (Pls.' Reply Mem. 1-3, 9 n.7; Walpin Reply Aff. ¶¶ 7-8.)

The legal standard under *Tinker* refers only to the requirement of a "well-founded expectation of disruption – especially one based on past incidents arising out of similar speech," *Saxe*, 240 F.3d at 212, not "past incidents arising out of the same speech." Furthermore, it does not require that the speaker be involved in past incidents. After all, the focus of the entire inquiry is on the effect or possible effect of the expression in question and not the prior conduct of the speaker. While past actions of the speaker may be relevant because they possibly aggravate or ameliorate any effect or threatened effect of disruption, such considerations are only part of a full circumstantial analysis. For instance, while both the district and circuit court in *West* emphasized that the Confederate flag, as well as the plaintiff, had been involved in prior racial incidents, the courts did not limit their reasoning in finding plaintiff's suspension for drawing a Confederate flag constitutional to only prior incidents specifically involving the flag or the plaintiff himself. 206 F.3d at 1362-63, 1366-67; 23 F. Supp. 2d 1223, 1225-34 (D. Kansas 1998). Instead, the Tenth Circuit and the district court mentioned graffiti with racial slurs and racial incidents on buses as well as at athletic events. 206 F.3d at 1362-63, 1366-67; 23 F. Supp. 2d 1223, 1225-33.

Plaintiffs appear to suggest that Defendants must show the Foxworthy T-shirt "will" cause material and substantial interference and even that student objections to this Foxworthy T-shirt are a necessary if not sufficient prerequisite to such a showing.[21] *See, e.g.*, Pls.' Reply Mem.

[21] Plaintiffs apparently contend that Defendants must present sufficient evidence of actual disruption, not just the threat or even

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at 11-12.) These assertions, although an understandable response to certain contentions of Defendants and even based on Defendants' own observation that *Tinker* "noted that the school must first show that engaging in the prohibited conduct will 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.'" (Defs.' Mem. at 5-6 (quoting *Tinker* 393 U.S. at 511)), are not consistent with the overall case law. Numerous cases have used differing but rather similar language to express the standard required when speech regulation is based on the fear of future disturbance, ranging from "specific and significant fear of disruption," *Saxe*, 240 F.3d at 211, to a reason to believe that the expression might cause such disruption or interference,

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certainty of future disruption, arising from the expression in question. (*See, e.g.*, Pls.' Reply Mem. at 6-9.) Plaintiffs' contention admittedly is supported by some of the language of cases applying *Tinker*, *see, e.g.*, *Pyle*, 861 F. Supp. at 170 ("As has been repeatedly noted, schools have the right to prohibit speech that causes a substantial disruption to the educational process."); *Clark*, 806 F. Supp. at 120 ("Defendants have failed to establish that Plaintiffs' distribution of the religious tracts gave rise to a material and substantial disruption of the operation of [the school]."); *see also Castorina v. Madison County Sch. Bd.*, 246 F.3d 536, 543 (2001) (" . . . [I]t is clear that a formal factual finding with respect to the disturbance – if any – caused by the plaintiffs' actions is necessary before a final decision can be entered in this case."). Such a requirement of actual disruption or interference is at odds with case law finding that restrictions on speech may be appropriate based on a well-founded, specific, and significant fear or expectation of disruption. *See, e.g.*, *Saxe*, 240 F.3d at 211-17; *West*, 206 F.3d at 1366-67 (quoting *West*, 23 F. Supp. 2d at 1233); *Boucher*, 134 F.3d at 827-28; *Killion*, 136 F. Supp. 2d at 455. As Plaintiffs also appear to acknowledge, it is unnecessary that speech actually resulted in such disruption, and it is only necessary that there be "substantial reason to anticipate a disruption." (Pls.' Reply Mem. at 12-13 (quoting *Killion*, 136 F. Supp. 2d at 445-46)).

*see, e.g. West*, 206 F,3d at 1366. As pointed out by the Ninth Circuit in *Lavine v. Blaine School District*, 257 F.3d 981, (9th Cir. July 20, 2001), "*Tinker* does not require certainty that disruption will occur, 'but rather the existence of facts which might reasonably lead school officials to forecast substantial disruption,'" *id.* at 989 (quoting *Karp v. Becken*, 477 F.2d 171, 175 (9th Cir. 1973)). Given that the focus is on substantial disruption, student complaints may be relevant but are by no means a necessary component to the analysis. *Saxe*'s quotation from the district court decision in *Clark v. Dallas Independent School District*, 806 F. Supp. 116 (N.D. Tex. 1992) that student objections to the expression are insufficient to satisfy the substantial disruption test does not elevate these objections into a prerequisite for satisfying the test itself, *Saxe*, 240 F.3d at 212 (quoting *Clark*, 806 F. Supp. at 120)).

Considering the relationship between the term "redneck" prominently featured on the Foxworthy T-shirt and past expressions that have occurred in the school, the Court concludes these expressions, while certainly not identical, are quite similar, particularly given the overall school context. Perhaps most importantly, the term "hick," which is a label for the group responsible for such occurrences as White Power Wednesdays, is quite similar to the term "redneck."[22] This similarity is the case even if Thomas

[22] Plaintiffs admit that "defendants ... present some evidence of the existence of a group known as the Hicks." (Pls.' Reply Mem. at 3; Walpin Reply Aff. ¶ 11.) But, earlier, they also argue that "the assertion of the existence of such group [is] unsupported by any competent evidence." (Pls.' Reply Mem. at 3.) While Thomas clearly denies his membership in any such group (Thomas Sypniewski Reply Aff. ¶ 2),

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understands "hick" to mean a farmer as well as "redneck" to mean "a non-sophisticated person who likes to work and play in the outdoors" (Thomas Sypniewski Reply Aff. ¶ 14) or as an individual who likes country music, hunting, as well as other outdoor activities, and "has a big heart."[23] (Thomas Sypniewski Aff. ¶ 8.) It also exists regardless of any appropriate use of the term "redneck" in the general culture. (Walpin Reply Aff. ¶ 13.) The Court further finds similarities between the banned Confederate flag and the term "redneck" as well, indicated, for instance, by German's complaint about a shirt with both the words "redneck" and a Confederate flag.[24] (Merluzzi Certif. ¶ 5.)

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Plaintiffs present no factual evidence against the group's existence, instead apparently objecting to the evidence's basis in hearsay, a contention which we have rejected. (*See* n. 19 *supra*.)

[23] The Court notes that *Webster's Third New International Dictionary* defines a "redneck" as "a white member of the Southern rural laboring class," indicating that it is usually used disparagingly. *Webster's Third New Int'l Dictionary* 1903 (1986). Similarly, a "hick" is defined as "an awkard, rude, unsophisticated, or provincial person." *Id.* at 1065.

[24] Plaintiffs point out, in both their reply memorandum and Walpin's affidavit, that Defendants do not deny that Thomas wore the T-shirt many times without any resulting violence or student complaint. (Defs.' Reply Mem. at 12 n.10.) The Court further notes that there is no evidence that any student or administrator ever objected to the Foxworthy T-shirt when worn by Brian and Matthew (Brian Sypniewski Aff. ¶ 4; Matthew Sypniewski Aff. ¶ 4.), and Griffin told Brian that the Foxworthy T-shirt was acceptable. (Brian Sypniewski Aff. ¶ 5.) These considerations certainly are relevant, but it does not indicate that Plaintiffs have a reasonable probability of success on the merits as to the application of the *Tinker* substantial disruption test to the Foxworthy T-shirt.

Plaintiffs similarly contend that the absence of an objection to a redneck T-shirt is unaffected by German's observation that "some of the aforementioned [Confederate flag] shirts ... which offended this

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Plaintiffs themselves appear to admit that "the board['s] . . . extensive findings, issued along with the press release, would probably justify a continuing prohibition on the Confederate flag." (Pls.' mem. at 17.) These findings, given the similarity between the Confederate flag and the term "redneck," would also justify the banning of the term "redneck" as it appears on the Foxworthy T-shirt. Given the past history at the High School and the similarity between the word "redneck" and past incidents, the Court concludes that Plaintiffs have not demonstrated a sufficient probability of success as to the prohibition of the Foxworthy T-shirt under the *Tinker* substantial disruption

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student[,] in addition to displaying the [C]onfederate flag[,] also contained the word, 'Redneck' on them. (Pls.' Reply Mem. at 12 n.10; Walpin Reply Aff. ¶ 14 n.6; Merluzzi Certif. ¶ 5.) Plaintiffs similarly contend, that even accepting the "unsupported assertion" regarding German's complaint, "it further establishes that although the objecting student saw the 'Redneck' on the T-shirt, it did not bother her," partly because no student ever objected to a T-shirt containing just the word "redneck." (Pls.' Reply Mem. at 12 n.10; *see also* Walpin Reply Aff. ¶ 14 n.6.) The Court, however, does not rely primarily on this incident as evidence that the term "redneck" itself has offended students, although the statement by Merluzzi could be interpreted as stating that it has. Instead, the presence of the term "redneck" with the Confederate flag highlights their similarity. Thomas was also depicted with a T-shirt containing the word "Redneck" embroidered with the Confederate flag. (Merluzzi Certif. ¶ 51 & Ex. U: Susan Todd, *District Waits to Ban Shirts with Rebel Flag*, Star-Ledger, Oct. 4, 2000, at 31; Griffith Certif. ¶ 18.) Although Defendants cannot punish Thomas for wearing this particular T-shirt at a time the Confederate flag was not specifically banned (Walpin Reply Aff. ¶ 12 n.4; Merluzzi Certif. ¶ 28 n.4) and it appears Thomas wore this T-shirt, at least on this particular occasion, off-school premises, *see, e.g.*, *Saxe*, 240 F.3d at 216 n.11, the Court cannot agree with Walpin that the T-shirt is therefore "totally irrelevant." (Walpin Reply Aff. ¶ 12.n.4.) On the contrary, it provides even further evidence of the connection between the term "redneck" and the Confederate flag.

standard.[25] Therefore, we conclude as a preliminary matter that the school may apply the Racial Harassment Policy to prohibit the wearing of that T-shirt at school activities without violating the constitutional speech rights of the students.

## III. Irreparable Injury

Generally, a party seeking a preliminary injunction must make "a clear showing of immediate irreparable injury." *Hoe v. Casey*, 868 F.2d 69, 72 (3d Cir. 1989). The deprivation of liberties protected by the First Amendment, however, constitutes irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Generally, "a plaintiff who meets the first prong of the test for a preliminary injunction will almost certainly meet the second, since irreparable injury normally arises out of the deprivation of speech." *ACLU v. Reno*, 217 F.3d 162, 172 (3d Cir. 2000) (citation omitted), *cert. granted sub nom., Ashcroft v. ACLU*, 121 S. Ct. 1997 (2001).

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[25] Plaintiffs attempt to rely on the district court's decision in *Killion v. Franklin Regional School District*, 136 F. Supp. 2d 446 (W.D. Pa. 2001), to show that the Foxworthy T-shirt does not satisfy the *Tinker* substantial disruption standard. *Killion* involved a student who created a lewd "Top Ten" list regarding the school's athletic director. *Id.* at 448-49. The district court concluded that the school officials failed to provide any evidence of actual disruption and rejected their reliance on past lists created by the student because they failed to present any evidence that such lists themselves had resulted in disruption, noting that evidence that these lists upset staff members was insufficient and that the student had never been previously disciplined for such lists. *Id.* at 455-56. In the case before this Court, however, Defendants have provided evidence of expression and disturbances apart from any prior incidents related to Thomas, Matthew, and Brian.

The Court has found preliminarily that the challenged portions of the Racial Harassment Policy are not constitutionally invalid and may be applied to prohibit the wearing of the Foxworthy T-shirt at school. It therefore follows that Plaintiffs face no irreparable injury from enforcement of that Policy at this time.

On the other hand, if Defendants continue to rely upon the challenged portions of the Dress Code to prohibit the Foxworthy T-shirt, the Court can envision irreparable harm to Plaintiffs. That is because, as we have found, that portion of the Dress Code appears not to satisfy the *Tinker* standard based upon the present record before the Court. However, inasmuch as this ruling is prospective only, the Board may determine that it will not apply the Dress Code prospectively for that purpose and will instead rely only on the Racial Harassment Policy to address the wearing of the Foxworthy T-shirt. In those circumstances the Court would see no necessity to enjoin the use of the Dress Code because Defendants by their actions would be avoiding creating any possible constitutional violation involving the Dress Code. The time to declare that portion of the Dress Code unconstitutional, if ever, would then be upon the final adjudication of this action rather than at this preliminary injunction stage.[26]

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[26] Although not raised by the parties, certain case law indicates that a reasonable probability of success on the merits does not result in an automatic finding of irreparable harm, even in a First Amendment case. *See, e.g., Hohe*, 868 F.2d at 72-73; *Waterman v. Verniero*, 12 F. Sup. 2d 364, 377 (D.N.J. 1998), *rev'd on other grounds*, 183 F.3d 208 (1999). Instead, a party must show a chilling effect on free expression or, in other words, a direct penalization as opposed to an incidental inhibition of speech. *See, e.g., Hohe*, 868 F.2d at 72-73 (citations

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## IV. Balance of the Hardships

In general, a court should consider the possibility of harm to the nonmoving party from the grant of injunctive relief. *Oburn v. Shapp*, 521 F.2d 142, 152 (3d Cir. 1975); *Del. River Port Auth. v. Transamerican Trailer Trans., Inc.*, 501 F.2d 917, 924 (3d Cir. 1974) ("We believe that when considerable injury will result from either the grant or denial of a preliminary injunction, these factors to some extent cancel each other."). The Court must also consider the hardship to any interested third parties. *See, e.g., Oburn*, 521 F.2d at 152.

The Court finds that on this injunctive application both parties present compelling concerns which must be carefully balanced. It is beyond cavil that in our society in general, a content-based restriction upon pure expression "is ordinarily 'subject to the most exacting First Amendment scrutiny." *Saxe*, 240 F.3d at 207. In that setting, there "is . . . no question that the free speech clause protects a wide variety of speech that listeners may consider deeply offensive, including statements that impugn another's race. . . . " *Id.* at 206. At the same time, the Supreme Court has made it clear that a regulation of student speech is generally permissible when the school authorities have a specific and significant fear that such speech would substantially disrupt or interfere with the

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omitted); *Waterman v. Verniero*, 12 F. Supp. 2d at 377 (citations omitted). The Court will not specifically discuss this question given the absence of any specific argument by the parties. However, given the Court's resolution of the first prong of the preliminary injunction inquiry, it would appear that Plaintiffs have not shown such chilling effect on speech.

work of the school or the rights of other students. *Id.* at 211. The present record shows that Defendants have used a careful and incremental approach in attempting to address the developing racial situation in their schools which affects the entire student body and staff, and have found it necessary in the current circumstances to take measures more restrictive than they would otherwise favor. We have found as a preliminary matter that those measures, as embodied in the Racial Harassment Policy and applied to the Foxworthy T-shirt, do not violate the free speech rights of the students. By the same token we find that the hardships experienced by the opposing parties in this action, while real and substantial, must at this time be balanced in favor of allowing the Policy to be thus enforced.

## V. The Public Interest

The Court recognizes that neither the government nor the public itself can claim an interest in enforcing an unconstitutional law. *See, e.g., ACLU v. Reno*, 217 F.3d 162, 180-81 (3d Cir. 2000), *cert. granted sub nom., Ashcroft v. ACLU*, 121 S. Ct. 1997 (2001). This Court has ruled preliminarily that the enforcement of the Racial Harassment Policy to prohibit the wearing of the Foxworthy T-shirt at school does no violate Plaintiffs' constitutional rights, and accordingly we find that the public interest also favors this result.

The Court will not lend its aid in the enforcement of the challenged portions of the Dress Code, for reasons stated herein, and we find that the public interest would favor an injunction against such enforcement if Defendants persist in their announced intention to enforce the

Dress Code also against the wearing of that T-shirt. However we will give the Defendants the opportunity to respond on this point, and thereby perhaps moot the issue, before the Court would impose the extraordinary remedy of injunction.

## CONCLUSION

For the reasons stated, the Court has concluded that no preliminary injunction will issue against the school authorities to the extent that they seek to enforce the challenged portion of the Racial Harassment Policy and apply that Policy to prohibit the wearing of the Foxworthy T-shirt at school activities. The Court has further concluded as a preliminary matter that the challenged portion of the Dress Code may not satisfy constitutional standards and should therefore not be enforced prospectively during the pendency of this litigation against the wearing of clothing which violates the Racial Harassment Policy.

Counsel for the parties are directed to contact the Courtroom Deputy to schedule a conference with the Court to determine the form of the order on this motion.

**MARY L. COOPER**
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 01-3542

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THOMAS SYPNIEWSKI, JR.;
MATTHEW SYPNIEWSKI; BRIAN SYPNIEWSKI

v.

WARREN HILLS REGIONAL BOARD OF EDUCATION; PETER MERLUZZI, in his personal and official capacity as Superintendent of the Warren Hills Regional Board of Education; BETH GODETT, in her personal and official capacity as Principal of the Warren Hills Regional High School; RONALD GRIFFITH; PHILLIP CHALUPA, in their personal and official capacity as Vice Principals of Warren Hills Regional High School; ELIZABETH AMES; MARCY MATLOSZ; RAY BUSCH; SUYLING HEURICH; JAMES T. MOMARY; NANCY FALLEN; WILLIAM MILLER; BRADLEY BRESLIN; SCOTT SCHANTZENBACH, in their official capacity as members of the Warren Hills Regional Board of Education

Matthew Sypniewski; Brian Sypniewski,

Appellants

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(D.C. Civ. No. 01-cv-03061)

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SUR PETITION FOR REHEARING

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Present: BECKER, *Chief Judge*,
SLOVITER, SCIRICA, NYGAARD, ALITO, ROTH,
McKEE, RENDELL, BARRY, AMBRO, FUENTES,
SMITH and ROSENN*, *Circuit Judges*, and
WARD**, *District Judge*.

The petition for rehearing filed by appellees in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

/s/ Anthony J. Scirica
Circuit Judge

Dated: OCT 29 2002

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* As to panel rehearing only.

** The Honorable Robert J. Ward, United States District Judge for the Southern District of New York, who sat by designation, as to panel rehearing only.